United States Court of Appeals

for the Second Circuit

APPENDIX

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77-7125 77-7126

United States Court of Appeals For the Second Circuit

DOROTHY L. COLE, LOIS H. ZISOOK, HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees, SAMUEL GREENFIELD FUND, INC. and HAROLD STILLER and MILDRED STILLER, as joint tenants,

Plaintiffs,

DOROTHY L. COLE, HARRY W. VOEGE, and ANNA MAY TUNMORE, as Trustees, and HAROLD STILLER and MILDRED STILLER, as joint tenants,

Plaintiffs-Appellants,

v.

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION, RAPID-AMERICAN CORPORATION, ISIDORE A. BECKER, BERNARD GOLDBERG, PAUL A. JOHNSTON, DAVID A. CHERNOW, WALTER O. HEINZE, HOWARD FELDMAN, MILO B. HOPKINS, RUSSELL G. SMITH, ALBERT N. GREENFIELD, MESHULAM RIKLIS, GLEN ALDEN SUBSIDIARY, INC., P.J. CLIFFORD, W.P. JOHNSON, S. KITTAY, M.L. MENDELL, L.C. LANE, G.H. PERKINS and B. DENMARK,

Defendants-Appellees.

JOINT APPENDIX
(Volume III—Pages A658-A947)

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JOINT APPENDIX

TABLE OF CONTENTS

Volume I	Page
Docket Entries	A1
Consolidated Amended Complaint, Counts I, II & III	A18
Answers to Consolidated Amended Complaint	A72
Pre-Trial Order dated February 10, 1975 (Excerpts)	A109
Pre-Trial Order dated October 9, 1975	A109
Appellants Opening Statement	A131
Appellees Opening Statements	A157
Testimony - Defendant Meshulam Riklis	
Direct	A179
Cross	A318
Re-Direct	A323
Argument	A326
Testimony - Defendant David Chernow	
Direct	A350
Cross	A550
Re-Direct	A864
Cross	A878
Witness Charles Nostrow	
Direct	A567

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Page

Witness Robert J. Gummer

Direct..... A581

Cross..... A619

Re-Direct..... A624

Witness Joseph Gardner

Direct..... A634

Cross..... A793

Witness Stanley S. Shuman

Direct..... A658

Cross..... A782

Witness George F. Dormer

Direct..... A797

Cross..... A852

Re-Direct..... A862

Cross..... A862

Offer of Evidence..... A880

Judgement of District Court (1/3/77).....

Excerpts from Draft Report of Appraiser in Gibbons v. Schenley, Ind. Inc., pages 11-14..... A883

Leasco Prospectus pages 86, 87, 105..... A937

Page 9 of Tender offer Prospectus of Rapid American Corp. 10/19/71..... A940

Page 25 of Proxy Statement of Glen Alden 10/6/72.... A942

Accounting Research Bulletins #43, Chapter 5.. .... A943

Index to Exhibits:

Appellant's Exhibits #		Page
1.	The Schenley Proxy Statement dated May 21, 1971	A948
2.	The Schenley Proxy Statement dated November 17, 1969	A1073
3.	The Glen Alden Prospectus dated August 8, 1968	A1172
5.	The Graham Report dated February 6, 1967	A1268
6.	Affidavit of Alan C. Greenberg, sworn to May 2, 1968	A1311
7.	Annual Report of Schenley Y/E 8/31/68	A1340
8.	" " " " 12/31/69	A1352
9.	" " " " 12/31/70	A1364
10.	" " " " 12/31/71	A1376
11.	" " " " 12/31/72	A1388
17B.	Schenley Balance Sheet as of May 31, 1971	A1402
61.	Loan Agreement Amendment between Prudential Insurance Co. of America and Schenley dated June 7, 1971	A1403
64(a).	Letter from Allen & Co., Inc. to Schenley dated June 3, 1971	A1405
66.	The Buckingham Corporation Statements.	A1408.1
94.	Hearing before Referee Samuel A. Neuberger in Sanders v. Riklis	A1409
114.	Glen Alden 10-K, 1971, Excerpts	A1410
117.	Memorandum of Understanding between Schenley and Northwest Industries, Inc.	A1414.1
118.	Stock Purchase Agreement	A1414.4

Appellant's Exhibits #		Page
145.	Daily Prices for Schenley Common & Convertible Preferred	A1415
147.	Schenley Industries Inc. Cash, Cash Equivalent, Marketable Securities	A1434
148.	Schenley Industries Inc. Change in Cash Certificates of Deposit, etc.	A1435
150(c).	Printers Proof, Proxy Statement	A1436
154.	Comparative Financial Statistics of Seven Distillery Companies (Schedule A)	A1438
155.	Schedules B, B-1 through B-8	A1440
155C.	Schedule C	A1451
155C-1.	Schedule C-1	A1453
156.	Greene v. Schenley Industries Transcript	A1454

Appellees' Exhibits #		Page
A.	Workpaper R.A. 7 1/2's re: Merger	A1458
B.	Press Release Schenley-Northwest Sign. Agreement and Clippings	A1459
C.	Greene v. Schenley, aff'd Carl Gluck	A1462
D.	Greene v. Schenley, aff'd Lawrence J. Goldstein	A1466
E.	Greene v. Schenley, Excerpt from Transcript	A1468
F.	Excerpt from Transcript - Zisook v. Schenley	A1471

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S T A N L E Y S. S H U M A N, called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ODELL:

MR. ODELL: Your Honor, may I present Mr. Solvay, who is counsel to Allen & Co., and representing Mr. Shuman here today.

May I be permitted to remain seated?

THE COURT: Yes.

Q Mr. Shuman, you are appearing here today pursuant to a subpoena duces tecum that was served upon you some time ago?

A Yes, sir.

Q Would you tell us, please, what is your position in Allen & Co.?

A I am executive vice-president of Allen & Co. Inc.,

Q And how long have you been executive vice-president of Allen & Co.?

A I am not sure of the exact date, five years at least.

Q In what business is Allen & Co., Inc. engaged?

A We are engaged in the investment banking busi-

ness.

Q And would you describe for the Court very briefly the nature of your business as investment bankers?

A Yes. The nature of our business is to arrange financings for companies, give financial advice, do underwritings, trade in securities, and invest our own capital in a number of different situations, corporately.

Q Is there any ownership relation between Allen & Co., Inc. and Allen & Co. itself?

A Yes, there is.

Q Would you explain what that difference is and what the relationship is?

A Yes. Allen & Co. is a partnership, the partners of which own 50.5 per cent of the stock of Allen & Co., Inc.

Q Are you a partner of Allen & Co.?

A No, I am not.

Q Are you a stockholder of Allen & Co., Inc ?

A Yes, I am.

Q Would you tell us briefly what percentage of the stock of that ocmpany you own?

MR. SILVERMAN: I object, your Honor.

THE COURT: I will take it.

Overruled.

A Approximately 4 per cent.

Q Now, to the best of your recollection, when did Allen & Co. Inc., first do any investment banking business with Glen Alden Corporation?

A With Glen Alden Corporation?

Q Yes.

A To the best of my recollection that was 1968.

Q And was that in connection with a tender offer?

A Yes, it was.

Q That was made for the common stock of Schenley.

A Yes, sir.

Q If you recall, what function did Allen & Co., Inc.perform in connection with that tender offer?

A We were one of three dealer-managers in connection with that tender offer, and we advised -- we gave some adv in that transaction with resp-ct to the value of the securities being offered as it relates to a contractual clause in the purchase agreement from Mr. Rosenstiel by Glen Alden of his shares.

Q And could you summarize for us very quickly what that opinion was that you gave in that connection?

A It wasn't a formal opinion. First of all, it was merely -- it was a report on our analysis that the eventual package which was offered to the public, which

was the 6 per cent debentures, hundred dollar face amount for each dollar and a half plus $13 of cash, at the time I think we were looking at the proposal it was $10 of cash, was essentially equivalent to a greater than a package of securities which was delineated in the Rosenstiel agreement, the exact nature of which I don't recall.

Q Do you recall that Mr. Rosenstiel was paid $53.33 per share, approximately, for each share of the Schenley common that he sold to Glen Alden in March of '68?

A Yes, I do recall that.

Q And so that is it fair to say that the oral opinnion that you have just described was to the effect that the package that was being offered under this tender offer that you described was at least equal to the $53.33 that was paid Mr. Rosenstiel?

A No, that is not the oral opinion that I gave. There was a clause in the Rosenstiel purchase agreement which said that Glen Alden would offer a certage package of securities which was deemed to be equivalent to the $53 a share, and our task was to compare the ultimate package that was offered to the public, which was different from the contractual package that was mentioned therein as opposed to the $53 a share.

Q Well, was it your opinion that the package was deemed to be at least equal to the $53.33 paid to Mr. Rosenstiel?

A It was my opinion that the package was deemed to be equal to the other packages that was in the contract, as I recall.

Q Now, after -- would you tell the Court briefly, what is the function of a dealer-manager in the prospectus of this kind in a tender offer?

A The function of a dealer manager really is to put together a soliciting dealers group and to run the books as it were for a public solicitation of securities which are being offered in exchange for other securities.

Q In the course of your function as a dealer-manager here, did you also act as a financial adviser to Glen Alden in putting this package together?

A Only to the limited extent that I have described.

Q That is to say, the value of the package as you have testified?

A Yes, sir.

Q After this tender offer was completed, did Alen & Co., Inc. perform any other functions, additional functions, for Glen Alden between August of '68 and roughly January of '71?

A Not for Glen Alden specifically, as I recall.

Q Well, did you perform any functions for Rapid-American Corporation?

A Yes, sir, we did.

Q Would you tell us what those were, briefly?

A I believe in 1969 again we were involved as a dealer-manager in an exchange offer for shares of Glen Alden by Rapid-American.

Q Was that the subject of a prospectus or a tender offer statement?

A Yes, sir.

Q Now, were there any functions performed by Allen & Co., Inc. for either Rapid-American Corporation or Glen Alden after that tender offer of 1969?

A Yes, sir.

MR. SILVERMAN: Until when?

MR. ODELL: Until January of '71, I am sorry.

A No, sir, I don't believe so.

Q Pardon me?

A No, sir, I don't believe so.

Q All right.

That tender offer of Rapid-American in 1969, did that result in creasing the number of shares of Glen Alden stock owned by Rapid-American?

A Yes, sir.

Q By approximately how much, do you know?

A I don't have a clear recollection of that. I believe Rapid ended up owning approximately 6 per cent of Glen Alden is my recollection, or something of that sort, but I am not sure what percentage they started with.

Q Could you fix in point of time exactly when that tender offer was made?

A No, I can't, sir.

Q Was it in the early part of '69 or the latter part of '69?

A I don't recall.

Q Did Allen & Co. Inc. act as the financial adviser to Rapid-American in connection with that tender offer?

A No, sir.

Q Now, would you tell us when it was for the first time that Allen & Co. Inc., was first contacted about the possibility of acting as financial adviser in connection with a proposed merger between Schenley and Glen Alden Corporation?

A My recollection is that it was some time during the first week of March 1971.

Q And by whom were you contacted or whom did you

contact on behalf of the other party to the merger in Schenley?

A Isidore Becker.

Q He first contacted you?

A He had tried to contact me, my recollection was and I was out of town and left a couple of phone calls which I returned when I got back to town.

Q Could you place a date on when you were contacted by him for the first time?

A Some time during the first week of March, I believe it was.

Q Do you keep a record of telephone conferences held by you with customers and potential clients of Allen & Co.?

A No, I don't keep a permanent record of telephone calls.

Q Is a diary kept --

THE COURT: Is it critical that we get down to the exact day?

MR. ODELL: Well, it would be more helpful your Honor, in view of when the opinion was given here. that we know how much lead time was had in connection with --

THE COURT: He said the first week in March which gives you a reasonably decent starting point, it seems

to me.

Q Was that a telephone conversation you had with Mr.Becker or did you meet him personally?

A I returned his telephone call.

Q What did Mr.Becker tell you?

A I don't have a clear recollection of what the conversation was specifically about, other than the fact that he indicated to me -- brought me up to date on the fact that there had been an announcement of a merger proposal from Glen Alden to Schenley, and that the offer by Glen Alden had been accepted by the board of Schenley subject to an investment banking opinion, and he told me that he would like to talk to me about the possibility of engaging Allen & Co. Inc., to represent Schenley in the transaction.

nd 2

T3 Q And what did you say to him?

A I said I would be happy to talk to him.

Q Did that talk take place?

A Yes, it did.

Q When did that take place?

A Again, I don't have a clear recollection of when it took place, but shortly after the phone call, I'm sure within perhaps the same day or perhaps the next day, I went to meet with Mr. Becker.

Q You went to meet with Mr. Becker at his office?

A Yes.

Q All right. Now, would you tell us what was said by Mr. Becker to you at his office and what you said to him?

A Again, I don't have a clear recollection of the dialogue, but I can tell you substantially what took place at that meeting.

Q Give us the substance of what was stated.

A Again he reiterated what he had said in his phone conversation and asked if Allen & Company, Inc. would undertake such an engagement, and said that, if we would, that he would be available at any time to discuss the situation at length and that Mr. Chernow, who was the chief financial officer of Schenley, would be available to me at any time to provide whatever information I might request in being able

to follow through on the job.

We discussed the fee involved, or that might be involved, in such an engagement, and I think Mr. Becker probably tried to give me a feeling for the scope of the transaction and enough information to permit me to look at it preliminarily in a way that would permit me to decide whether or not the firm would want to go forward on the engagement, and I told him that I would get back to him shortly and let him know whether or not we could undertake the matter.

b2 Q What was it that Mr. Becker told you that gave you, as you put it, a feel for the transaction, for the scope of the transaction?

A Well, he told me what the proposed terms were as they were publicly announced. And, as I said, I had not been in the city, or indeed in the country, on February 25th, when the announcement was made. I seem to remember that he gave me a copy of the press release as of that date and described the proposed transaction.

Q At that meeting with Mr. Becker, did he give you a draft of the proposed proxy statement on the merger?

A No, I don't recall that he did. I'm not sure whether he did or not, but I have no specific recollection of that.

Q You also mentioned that a discussion took place with respect to the fee. What was the discussion?

A Well, again, my recollection of that discussion was that I told Mr. Becker, if we did undertake the job, that we felt we would be charging a certain amount of money, and he said that he thought that, although he would take it into consideration, that was a little high, and he suggested another amount of money, and at some point shortly thereafter in the next day, when we accepted the engagement, we settled on a fee.

Q And what was that fee?

A $200,000.

Q You left that meeting with Mr. Becker and presumably went back to your office to discuss the matter with your colleagues there?

A Yes, sir.

Q What decision was made by Allen & Company, Inc. with respect to it?

A Obviously, we accepted the engagement.

Q And did you go to see Mr. Becker again to talk to him again, to tell him that?

A I'm sure I either spoke to him or went to see him, and probably both.

Q And how many days would you say elapsed between this first telephone call from Mr. Becker and your telephone conversation in which you advised him that Allen & Company

was prepared to take on this engagement?

A Well, as I stated, Mr. Odell, I received a couple of phone calls from Mr. Becker when I was out of the country.

Do you mean between the first time I actually spoke to him --

Q When you spoke to him.

A No more than a day, I'm sure. But I don't know precisely when during the day that might have been. I'm sure we responded quite quickly, because he had asked us to, as I recall.

Q I'm not sure I understand. Between your first telephone conversation with Mr. Becker, when he told you what he had in mind in the way of the engagement of Allen & Company, and your getting back to him and telling him that Allen & Company was prepared to take on the engagement was a matter of just a day or two?

A If I saw him the day I first spoke to him on the phone, I'm sure it was no more than one more day before I got back to him with an answer that we would accept the engagement. If I didn't see him until the next day after I received his first phone call, it would be two days. And I don't recall exactly when that was or what the time span was.

Q And when did you settle on this fee of $200,000?

A I don't know exactly when we settled on it, but I

presume at the time we agreed to accept the engagement we agreed upon the fee.

Q Was the engagement and the fee to be paid the subject of a written agreement between you and Mr. Becker?

A No, it was not. And it was not the subject of a written agreement between us and the company either.

Q By "the company" you are now talking about Schenley, is that correct?

A Right.

Q Now, in these conversations you had with Mr. Becker did he indicate to you when an opinion from you was to be expected?

A I don't recall if he gave me an exact date. I believe he did tell me that there would be an upcoming board meeting of Schenley at which I would be expected to opine. I knew that it would be in a reasonably short period of time, but I don't recall that he gave me a specific date or a specific time frame.

Q Did there come a time after these conversations with Mr. Becker when you learned when it was you were expected to give this opinion?

A I'm sure there was a time when I learned when I had to give the opinion.

Q Would you accept March 25th as the date on which

the board met and you appeared?

A Yes, sir.

Q And would you tell us, was that date mentioned to you by Mr. Becker in the course of these conversations you had with him in March?

A I tried to answer that question. I don't recall him specifically mentioning a date during the course of my initial conversations other than to say that there would be an upcoming board meeting and that I should be prepared to do my work as expeditiously as possible.

Q In these conversations with Mr. Becker, was the question discussed as to whether or not Allen & Company would make an independent investigation of the facts bearing on this proposed merger?

A Was it discussed?

Q Yes.

A I don't recall specifically whether it was discussed at that time or not. I think we state in the proxy statement that we did not make an independent investigation of the facts. I don't recall when that matter was specifically discussed.

Q Well, the proxy statement talks about Allen & Company "did not make any independent factual investigation of the affairs of either Schenley or Glen Alden."

With respect to that quotation and what the proxy statement says, I would like to have you tell us what was discussed between either you and Mr. Becker or you and anybody else on behalf of Schenley as to this statement that is contained in this proxy statement that you were not to make an independent factual investigation of the affairs of Schenley.

b3 A I'm not sure anything was discussed. I believe that we envisioned the parameters of our job to be essentially a financial analysis for which we would use all publicly available information and whatever information that we might request from Schenley or Glen Alden that would be required in coming to a conclusion on our analysis, and I don't recall any lengthy discussion or any discussion on that particular point. I think it was just accepted that that was the way ~~we approach~~ our work.

Q Well, apart from the public information that you mentioned, by what means was Allen & Company to obtain the information necessary to pass on the fairness of this merger from, say, Schenley?

A Well, first of all, as I had mentioned before, we did have some understanding of the Rapid group of companies, including Schenley, with which we had been somewhat familiar in the past, particularly the 1968 transaction.

Secondly, Mr. Becker indicated that I could have

full run of anybody or any piece of information that I thought in the course of my analysis I might require from either Schenley or Glen Alden.

An analysis of this kind evolves over a period of time. You get information of a basic nature that you start with. You examine it and analyze it. It leads to additional questions and additional pieces of information that you require, which it did. I asked that of Mr. Becker and Mr. Chernow. I received verbally or in writing what I required and I accepted the information that I received.

I was not making an audit of the company. We were not doing an underwriting, which required me to visit various plants or things of this sort in the course of due diligence.

Naturally, if something would have come up that would have offended my sensibilities and required me to ask further, and there were problems in getting further information that I might have needed, then I would have looked still further. But that situation never arose in the course of my work.

Q Now, did there come a time when you began to request information concerning Schenley for the purpose of formulating your opinion?

A Yes, sir.

Q And would you tell us approximately when that was?

A It was approximately the day that I agreed to accept

the engagement, whatever day that was.

Q Tell us what you did in connection with starting the flow of information your way.

A Well, I requested all of the pertinent public information, including proxy statements, annual reports, filings with the SEC of Schenley, the necessary reports from Glen Alden, annual reports and other information of other companies in the liquor industry.

Schenley had a press clipping service with all of the material that had been in the public press, or a substantial amount of material that had been in the public press, for the last several years. I requested all public announcements of earnings, information about the market prices and volumes of trading of the relevant securities involved.

Q Did you request a copy of the drafts of the proxy statements that had been prepared up until that time?

A Yes, I did.

Q I am going to show you the printer's proof of a proxy statement dated March 6, 1971, and ask whether you saw this draft of the proxy statement.

Your Honor, may I mark this March 6th printer's proof Plaintiffs' Exhibit 150A for identification?

(Plaintiffs' Exhibit 150A was marked for identification.)

xx

Q I show you Plaintiffs' Exhibit 150A for identifcation and ask whether you had seen that printer's proof on or about the time you commenced your engagement here.

A I don't recall, Mr. Odell, whether I specifically received this proof or not. I requested copies of all proofs and received a number of proofs. But I don't know if this specifically was there or not. I have to assume that it was. I have no clear recollection of seeing this specific document.

MR. ODELL: Your Honor, I would like to offer this March 6th proof in evidence.

MR. SILVERMAN: Objection on the grounds of relevance.

MR. LEVIN: Objection.

THE COURT: Mr. Odell, why do you want it? At this point you haven't got enough in the record to get it in evidence without consent from the other side. Why do you want it?

MR. ODELL: Well, I want it for a number of reasons, your Honor. Your Honor, I am perfectly willing to answer the question, but I have subpoenaed all the records that were supplied to Allen & Company in connection with this proposed merger, and I would like to know whether among the records they produced is this March 6, 1971, proxy statement, printer's proof.

2 Q Mr. Shuman, you have your records here and
3 some people here with your records?
4 A Yes.
5 Q Could we find out whether you have that among
6 your records?
7 MR. SOLVAY: It may take a little while.
8 We have about seven large envelopes of reoords and I don't
9 know if there is a system that would enable us to check
10 very quickly whether or not it is among those.
11 MR. ODEL: Your Honor, I would like to identi
12 all of the printer'sproofs of this proxy statement and
13 tell you why I think they are relevant.
14 MR. ZULACK: Printer's proof dated March 8,
15 1971, as 150-B for identification.
16 March 10, 1971,as 150-C for identification.
17 March 11, 1971, 150-D for identification.
18 March 16, 150-E for identification.
19 March 19, 150-F.
20 March 24, 150-G.
21 Preliminary copy dated April blank 1971.
22 May 3, 1971, 150-I.
23 May 5, 1971, 150-J.
24 May 14, 1971, 150-K.
25 May 19, 1971, 150-L.

May 25, 1971, 150-M.

xxx (Plaintiffs' Exhibits 150-B through M, inclusive were marked for identification.)

Q Can you tell me, Mr. Shulman, whether you saw the proof of March 8, Plaintiffs' Exhibit 150-B?

A I saw it when, Mr. Odell?

Q On or about the time you were engaged in formulating the opinion as to the fairness of this merger.

A I don't recall whether I specifically saw that proof.

Q Did you see the proof of March 10, 150-C, during that same period of time?

A Again I don't recall whether or not I saw that specific proof, although it is in my file, I assume I must have.

Q And the proof of March 11, did you see that in the course of formulating your opinion?

A Again I assume that I did, but I don't have a specific recollection of any specific proof.

THE COURT: Well, if you don't have any recollection of any specific proof there is no point in continuing to show him these seriatim.

MR. ODELL: I think we are going to reach a point where the proof talks about him and his company.

I should think that he saw that.

THE COURT: Well, you are talking about a man who is sitting on the sstand in 1975, Mr. Odell, who says he doesn't recall it. He doesn't dispute it, but he says he doesn't recall it.

A I am sure I must have seen the proofs that I received, Mr. Odell. I did request a copy of the proofs, but I don't specifically recall individual proofs.

Q All right.

Tell me this. Did you make any suggestions to changes in any of these printer proofs that you saw?

MR. SILVERMAN: Changes in what, sir?

Q Changes in the proxy statement?

MR. LEVIN: I can't hear you.

MR. SILVERMAN: We can't hear you.

MR. ODELL: I am sorry.

THE COURT: REad back the question, please.

(Question read.)

A Well, again, Mr. Odell, I don't have a specific recollection of changes I might have suggested in the proxy statement. There were two areas that I was specifically concerned with, naturally, and one was the section which related to Allen & Company Incorporated, and representations that Allen & Company Incorporated were making with respect

to what the scope of its work was in this case, and the prior relationships that we had with the companies involved in this case.

Secondly, in the course of our work we did recommend to the company that certain changes would be appropriate in the offer as it was originally made, and naturally, to the extent that those changes were made they found their way into the proxy statement.

Whether or not there were other specific areas that I might have pointed to in terms of reading and studying the proxy statements, I don't have a specific recollection of, but if I saw points that I thought should be reflected or in the proxy statement, I am sure I brought it to the attention -- or would have brought it to the attention of the issuer.

Q I might say we were not responsible, of course, for the proxy statement.

Q About when was it that you supplied the draftsman of this proxy statement with the information containing -- with the information that related to Allen & Company and the role that it was to play in connection with this proposed merger?

A I don't remember, Mr. Odell. It certainly was before the time it first appears in the first draft of

the proxy that it appears in, but I don't have a specific recollection of when that was.

Q Well, the first draft in which it appears that we can find is a draft dated March 25, 1971?

A Mr. Odell, perhaps I can be of a little help on that. There are a number of -- there are a number of representations or things that are stated in that paragraph, one of which refers to the amount of fees that Allen & Company Incorporated and affiliated partnership received over a period of time. We wanted to make sure that those representations were correct, and as we usually do in those cases, we go back into our files and accumulate that information.

We probably, as we usually do, circulated our employees to see if they had any substantial or material interest in any of its constituent companies, Rapid-American or its affiliated companies, that all takes a period of time, so, undoubtedly we went through that procedure and when we completed it, we provided the company with the information that would be needed for that paragraph.

Q Did you also at that time provide the company with the information as to the amount of your fee?

A The amount of the fee, I think I stated was established very early in my conversations with Mr.

Becker, so I didn't have to provide them with that. They knew what it was.

Q Mr. Shuman, the printer's proof of March 24 for the first time puts the name of Allen & Company into this proxy statement.

Would you accept that as about the time you started to supply Schenley with the information concerning Allen & Company?

A No, sir, I would not.

Q About when then would you place it?

A Which information are you referring to?

Q I will be glad to show you what that proof shows.

Well, first I am going to show you the proof of March 16, page 4, which says the investment banking firm of "blank" and goes on to describe --

A Yes, I have read it.

Q Did you see that proof?

A I think, as I stated before, Mr. Odell, I don't recall seeing any specific proof. I requested all proofs. I believe I read all the proofs that I received in response to my request.

Q I now show you the proof of March 24, 1971, page 9 of which has the name Allen & Company inserted in it.

meb-7 Shuman-direct

A Yes, sir.

Q Do you recall seeing that proof with your name in it?

A Again, I have to answer that question the same way.

Q The same as you answered the others? All right, sir.

In connection with this March 24th proof, I am going to ask you to look at page 5 which discussed the work done by Allen & Company for the various Rapid companies, and you see the last sentence there reads, "Since the conclusion of the Exchange offer Allen & Company Incorporated has not rendered services to or received compensation from Glen Alden, Rapid or any of their affiliated corporations."

Now, did you provide Schenley with that information?

A No, sir, I am sure I didn't.

Q Is that information accurate as stated there providing no functions for those companies?

A Well, this Exchange offer refers to the 1969 offer?

Q Well, you can see it there, and you are free to comment on it in answering my questions.

A Well, as it is written, it is an incorrect statement, I believe. I think when you originally had asked me what services we performed, I believe I did indicate that there were services performed in 1969, and this statement is to the contrary, and therefore, it would be wrong.

MR. SILVERMAN: Your Honor, I must rise to move to strike this on the grounds of relevance. That is not the proxy statement that was circulated.

THE COURT: Yes, unless you can tell me why you want this, I will strike it. I am a little puzzled as to why we are getting into all of these drafts.

MR. ODELL: Your Honor, let me give you some of the reasons why I think these drafts are important.

First, as they apply to Allen & Company, these drafts show a gradual change from their very first draft of March 24 where the board of directors -- where the earlier drafts talk about "Board of Directors of Schenley unanimously in favor of the proposed organization and recommends the shareholders approve the plan--" it goes on, the earlier drafts also say: "The desirability of the proposed reorganization has been the subject of careful consideration by the Board of Directors of Schenley

Now, all of that language that was in those earlier drafts is not found in the proxy statement that

became effective and was used in connection with the solicitation of the proxies, and at the same time that these changes -- this language was gradually being eliminated from the proxy statement we find the language coming in the proxy statement with respect to the role that was going to be played by Allen & Company, that is to say, that as this proxy statement says, "that the investment banking firm of Allen & Company Incorporated has acted as advisor to the Board of Directors of Schenley in connection with the proposed reorganization and has advised the Board that in their opinion the terms of the proposed reorganization are fair and equitable to the holders of Schenley common and 1940 preferred stock."

Now, it is my contention that this language that appears, and that I have just read to you, was designed to lead the reader of the proxy statement to believe that Allen & Company had been hired to make a full-scale investigation and study of this proposed merger, considering all the traditional indicia of value that goes into a determination that the terms of the merger are fair and equitable, that they were going to be paid $200,000, which is no lowly sum for doing that kind of a thoroughoing job on the basis of which they advised, that is to say --

THE COURT: Where are you looking in the final

version of the May 21st statement? What page are you at?

MR. SILVERMAN: Page 5, your Honor.

MR. ODELL: Page 5, paragraph 9.

THE COURT: Now, this exhibit is in evidence. This is the one that was sent to those concerns, and this is the one we are dealing with in connection with whether there are misrepresentations.

Now, I still don't understand why you want the drafts.

MR. ODELL: Well, I want these drafts to show that even though Allen & Company may have been retained as Mr. Shuman says, early in March, their name doesn't appear in the proxy, printer's proof, until March 24, the day before the meeting, at which the Board of Directors of Schenley, according to the minutes, on the opinion of Allen & Company, found this merger to be fair and equitable.

THE COURT: I think that fact is wholly irrelevant when their names first appeared in the draft. I don't draw any conclusion from that at all, Mr. Odell, one way or the other.

MR. ODELL: Your Honor, I have no answer to that, if that is your opinion. I don't know that I can convince you that that is some proof of the fact that very little work was done by Allen & Company prior to the

March 25 merger at which the opinion was given and the board approved the terms of this merger.

I believe this proof, together with other information that I will bring out --

THE COURT: Are there three or four proofs that were run between the time of the retention of Allen & Company and the date of the meeting, and their name appears in the proof just before the meeting?

MR. ODELL: That's right.

THE COURT: And you want me to conclude from the fact that it did not appear in two or three earlier drafts that they therefore were not working?

MR. ODELL: Your Honor, I want --

THE COURT: I do not see any rational connection between the absence of their name in the printer's proof and the fact that they were not working.

I just don't see how you can draw one from the other no matter how you look at it.

MR. ODELL: Your Honor, may I say this. There is more proof that will come as to what was done by Allen & Company.

THE COURT: That is fine, but that has nothing to do --

MR. ODELL: Prior to -- this is one item of

proof and I don't want to spent any more time --

THE COURT: I am inclined to grant the motion to strike on this state of the record.

MR. ODELL: May I tell you the other reasons for introducing this proof besides this one?

THE COURT: Please.

MR. ODELL: The earlier drafts of these printer's proofs show a disclosure of information concerning the fact that Schenley was going to buy these debentures of Glen Alden. The proof, as early as March 8th, I believe, shows that that proxy statement as then put together is to the effect that -- and I will quote this language verbatim -- but let me tell you what it says as well as I remember it at the moment -- that language is to the effect that Schenley intends to purchase these debentures that are to be given in this reorganization from Glen Alden at a price $5.00 less than their market price on the day the merger becomes effective.

Now, one of our principal grounds for contending that the disclosure in this proxy statement was defective was the failure to disclose the fact that Schenley was going to pay the $81 million to purchase these Glen Alden debentures.

That was in an earlier draft or two of this proxy

statement and disappeared by the time of the final draft, and these printer's proofs will show that.

THE COURT: Let's stick with that for a minute. Which proof and what line do you have in mind?

MR. ODELL: The March 10th proof which had been identified here, reads as follows: "Prior to the reorganization becoming effective --" I will skip the first line and read the second double line --"Schenley will purchase from Glen Alden all of the debentures to be issued in reorganization at a price for each $30 amount of debenture equal to the closing price of Schenley common stock on the last trading date prior to the effective date, less $5.000."

Now, that language is completely excluded from the body of this May 21st proxy statement.

THE COURT: Well, now, refresh my recollection; didn't the commitment change somewhat?

MR. ODELL: Pardon me?

THE COURT: Didn't the commitment change?

MR.ODELL: It changed but not by very much, your Honor.

MR. SILVERMAN: Your Honor --

MR. ODELL: The commitment -- the purchase took place. They purchased $100 million of these debentures

for $81 million.

And they paid $5.000 in cash on top of that to each common stockholder.

Now, those were the terms upon which this merger was consummated.

THE COURT: What do you want me to conclude from going from specific terms that bound them in the way apparently they did not want to be bound to general language which is in the final proxy?

What am I to conclude from that?

T5 MR. ODELL: I think the difference between this language and what was actually done is not so great as to indicate any substantial change in commitment or terms or anything else.

THE COURT: And what do you want me to conclude from it?

MR. ODELL: That there was an intentional failure to disclose what they had originally intended to disclose and which they considered at the time, in March, at the time this proxy statement was being written, which they considered material enough to put into the body of the proxy statement.

THE COURT: Mr. Silverman, why don't I take that one paragraph of Exhibit 150C and let Mr. Odell argue from it as he sees fit?

MR. SILVERMAN: Obviously your Honor will accept it for what it is worth, if you accept it at all. I would merely note that the description in the final proxy, that which we are concerned with, when measured against the merger that is reflected in the documents in that proxy, is an absolutely correct description, which is all that it purports to be.

Now, the draft that he is talking about is dated what? March 10th? Was that the date of that draft?

MR. ODELL: Yes.

MR. SILVERMAN: The plan and agreement of reorganization is dated May 21st. I do not know what the proposed plan and terms of reorganization on March 10th were, whether they differed at all. I do know, for example, that in the March 10th draft there is talk about prior to the reorganization.

Quite clearly, that is not what happened, that was not the transaction. To have disclosed that in the final document would perhaps have been misleading.

Moreover, when we look at the terms of the plan of reorganization and merger, it says "the purchase price of the debentures shall be the fair market value thereof as at the effective date."

Now, that is the terms of the merger, and it is that which is reflected in the final document.

He is talking about a draft. I don't know what the lawyers put into that draft. I suppose Messrs. Simpson Thacher and my firm have some responsibility for what went into their early drafts and other people have responsibility for making them more accurate and refining them, honing them as time went on.

It is the final proxy statement and the adequacy of those disclosures that is before you and the accuracy of those disclosures when measured against the merger that we

are talking about, and my friend hasn't yet said that there is anything wrong in the disclosure with respect to the final merger.

Incidentally, Mr. Gluck points out to me, and I will make the point, that in that draft that you are looking at nothing appears as appears in the final document on the first page, those four block warnings, you know, "Be careful," running up the warning signal. That is not in there.

Does my friend derive something from that? I hope he did, and that is that we were very careful in the final document.

The third page is not in. There are many changes in it, through the final draft. The final draft, we submit, accurately reflects the transaction. I don't know what my friend makes of prior drafts with respect to a document that was dated May 21st.

THE COURT: Well, Mr. Odell's position, if I understand it, is that the language he quoted to me from 150C for identification is approximately what in fact happened, and that from looking at that language you can see that they were going to lay out $81,000,000; that that language was deleted from the final draft and therefore a person reading that draft could not come to the figure of $81,000,000.

He says that that in some way renders the final

version misleading. I'm not prepared to say that he is right about that.

Am I right in the argument which you make?

MR. ODELL: Yes, sir, for that one point.

THE COURT: All right.

MR. SILVERMAN: If your Honor please, I can understand Mr. Odell's contention. Your Honor understands it. I would note, as I have several times in the past, that to have disclosed that $81,000,000 was going up would have been false, because $20,000,000 came back down, of which $15,000,000 went back up over four years.

My friend would have us put something in the proxy statement which I think he would then be claiming is a falsity. Substantial amounts of cash - that is - and we have argued this almost ad nauseam in three places, with all of the warnings - we suggest is adequate disclosure, indeed fulsome disclosure, of what in fact took place.

b219 THE COURT: Well, at this point I will receive in evidence, and give it such weight as it deserves, Exhibit 150C, page 2, the full paragraph following the paragraph heading "Terms of the Reorganization."

MR. SILVERMAN: If your Honor is going to take that paragraph, I would suggest that your Honor take the entire draft so that we can show in what ways that draft has been

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changed in many other respects.

THE COURT: Mr. Silverman, I don't know what I want to accept your offer, because the thing is that I don't want to get a record that, being marginally relevant as I now see it, requires an enormous amount of answering on your part.

MR. SILVERMAN: I will withdraw my suggestion.

THE COURT: All right. If you feel you are handicapped in some way at some later point, you may renew your proposal.

All right. To that extent, 150C is admitted in evidence.

(Plaintiffs' Exhibit 150C for identification was received in evidence.)

THE COURT: All right. Let's get on with the interrogation of Mr. Shuman.

BY MR. ODELL:

Q Mr. Shuman, when was it for the first time that you met with any of the Schenley directors to discuss the engagement for which you were retained?

A I think I --

Q Apart from your conversations with Mr. Becker. I'm sorry.

A I didn't meet with any directors of Schenley apart

from Mr. Becker and Mr. Chernow, but I only discussed the fee with Mr. Becker and I think I stated when I met with him, or when I thought I met with him.

Q Did there come a time when, after you were retained, you discussed with any director of Schenley proposed changes in the terms of the debenture that was to be offered in exchange for the Schenley stock?

A Again, other than Mr. Becker and Mr. Chernow, the first time I discussed it with any board members of Schenley was the board meeting of March 25th.

Q Did you before that board meeting of March 25th discuss with Mr. Becker whether the changes --

First, what changes did you recommend be made in the terms of these debentures?

A Well, my recollection is that I recommended that the term of the debenture be shortened from 15 years to 14 years; that sinking fund provisions, which eventually did end up in the debenture, namely that 3-1/2 percent of the principal amount for the first five years, be payable 5-1/2 percent for the next five years, 12 percent for the next three years, and that the remainder upon maturity be implemented; and, finally, that the debentures should be permitted to be used at face value for the exercise of any warrants of Glen Alden.

Q Now, did you discuss any of those changes affecting the Glen Alen debenture with Mr. Becker prior to the meeting with the board of directors of Schenley on March 25th?

A I'm sure I did.

Q Approximately when was that?

A I don't recall when that might have been, but I'm sure it was far along in my work.

Q Do you recall that the announcement that you referred to that was publicly made by Schenley concerning this proposed merger contained a provision to the effect that the debentures of Glen Alden would be senior to the then outstanding 6 percent debentures of Glen Alden?

A Yes, sir, I did.

Q Were any changes made in that seniority provision?

A Yes, sir, they were.

Q Who suggested that change?

A I believe it was the lawyers for either Glen Alden or Schenley, I don't recall which. There was a problem, as I recall, in the indebenture of the 6 percent debentures which prohibited the issue of senior indebtedness for anything other than money lent or the guarantee of money lent. And so the original proposal was in error as a matter of law as I understood it, and therefore the subordination provisions of the two debentures had to be made pari-passu.

Q As you understood it, who explained it to you?

A I can't recall exactly who explained it to me. I think it was counsel to the company. It might have been Mr. Becker. But, at any rate, that change was not my recommendation, although it was made together with the other changes in the same proposal.

THE COURT: Mr. Odell, is this a good time to break?

MR. ODELL: Yes, your Honor.

THE COURT: We will take about ten minutes.

(Recess.)

MR. ODELL: Your Honor, may I go off the record for a moment?

THE COURT: Sure.

(Discussion off the record.)

MR. TRYIN: Your Honor, at the close of the trial I wish to submit a memorandum on the third party beneficiary cause of action.

THE COURT: Leave is given to you to do that, plus other aspects that you may wish to comment upon.

MR. TRYNIN: Thank you.

THE COURT: Very good.

Go ahead, Mr. Odell.

MR. ODELL: Your Honor, I will try to move a

little faster than I did.

BY MR. ODELL:

Q Did there come a time, before March 25th, when you made requests upon Mr. Chernow for information that you felt you needed in order to appraise the fairness of this merger?

A Certainly.

Q And did Mr. Chernow supply you with whatever information you requested?

A Yes, on several occasions.

Q When did the first of those inquiries go forth to Mr. Chernow?

A Well, again, Mr. Odell, I don't have a clear recollection of the exact date, but, as I said, Mr. Becker had indicated that Mr. Chernow would supply me with whatever information I did require and request, and my recollection is that shortly after that first meeting with Mr. Becker I was in touch with Mr. Chernow to request certainly the publicly filed documents that I referred to before, at the very least.

Q Did you request from Mr. Chernow information that was not publicly filed information concerning Schenley?

A Yes, I did. As I said, the nature of this type of analysis is that you take a certain amount of information

that is very basic, analyze it, digest it; it brings up a number of questions; it occasions the necessity to have a discourse about those matters.

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And Mr. Chernow was always available to me by phone or in person, as was Mr. Becker, and I was working on the matter with somebody else in my office on a continuing basis during this period, and there was a constand flow of conversation and information supplied. But I don't have a recollection as to specific dates.

Q Well, had you, by March 25, 1971, obtained from Mr. Chernow all the records that you had requested in order to pass on the fairness of the terms of this merger?

A Well, I had obtained from Mr. Chernow all of the information. Some of it was documented by records and some of it was not as yet. I received a considerable amount of records per se later than March 25th in preparation for an affidavit, but I had all of the information that I required, and indeed the information that was contained in those records we subsequently followed as far as my analysis was concerned, by March 25th. So I'm satisfied that I had everything that I required to come to my opinion.

BY THE COURT:

Q Let me see if I can focus here for a minute. Tell me again. You conceived this task as being to do what?

What were you retained to do?

A I was retained to advise the board of directors of Schenley to whether or not the proposal that was being made by Glen Alden to Schenley shareholders was fair and equitable to those shareholders. And in the course of going about that task --

Q Wait a moment. Just one moment. Your reporting was to be to the board of directors of Schenley?

A Yes, sir.

Q All right. To do that, you asked whom for what kind of information?

A I asked the responsible management of Schenley for information concerning Schenley, and I dealt particularly with Mr. Becker and Mr. Chernow. And with respect to Glen Alen, I dealt with Mr. Obrow, who was the chief financial officer of Glen Alden, with respect to information that would be necessary for evaluating the quality of the debentures that were being offered.

Q To see whether you were getting what you expected to be getting.

A That's right.

Q And it was this that you had completed one way or another before the March 25th meeting; you had studied the facts to the extent that you felt it was necessary.

A Yes, sir.

Q And at that point you felt that you were prepared to, and you could and did, report on that.

A Yes, sir.

Q At the March 25th meeting.

A Correct.

THE COURT: All right. Very good.

Go ahead.

BY MR. ODELL:

Q You stated that you received some information after March 25th. Would you tell us what that was? What kind of information did you receive?

A I believe you asked if I received some records. I received some written information after March 25th, records, as you would. I don't recall specifically what those were, but there was nothing in those records which I hadn't previously discussed that I felt was material before March 25th.

Q Well, is it fair to say that whatever records you did receive after March 25, 1971, and before June 17th, 1971, did not alter in any way the opinion you gave to the board of directors of this company on March 25, 1971?

A Yes, sir, it is.

* * * * * * * * * * * * * *

18 Q Mr. Shuman, at this directors' meeting that
19 took place on March 25, you explained those various changes
20 in the debentures that you testified to.
21 Would you tell us what else you discussed with
22 the board of director s of Schenley bearing on the
23 fairness of the terms of this merger?
24 A Well, my recollection is that -- first of all,
25 of course, I introduced myself to the board and told them

who I was and disclosed to the board the nature of past relationships that we had had with Rapid-American and its various affiliates and put to the board what I felt the scope of our employment was, and told the board that after our analysis was completed, and based upon the proposed changes which we had made and which I understand the executive committee of Glen Alden had agreed to, that the transaction was fair and equitable to the shareholders of Schenley.

Q Do you recall the discussion of any matters other than those that you have just enumerated that you brought to the attention of the board of directors at that time?

A Well, I described to the board the factors that we took into consideration in coming to our determination, and I gave as complete a report as I could as to how we arrived at our conclusion and our reasoning, and then there was a question and answer period after that, after that position, and that is all I can easily recall about that meeting.

Q Did you discuss the market prices of the Schenley shares?

A Yes, of course. That was the major determinant in our conclusion.

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Q And did you tell the board that that was one of the major determinants of your opinion?

A I am sure I did.

Q Now, over what period of time did you tell the board you considered market prices?

A Well, we considered market prices over a long period of time. We took note of recent market prices from the beginning of 1971 until the date of the announcement of the merger and we looked at market prices going back several years, and looked at market prices over that period of time in relation to other companies in the industry, in relation to Schenley's historical range of market prices; we related the market price to its book value and we did as much work as we felt was appropriate in that area because we considered it the most important determinant value inasmuch as this was a publicly held company listed on the New York Stock Exchange, and with a free trading market.

Q Over what period of time, ending when, were American prices considered by you? You said on the announcement of the merger -- to the announcement date of the merger?

A Yes, sir.

Q And that was what, February 24?

A 25th, I believe.

Q Now, why did you cut off on February 25?

A Well, after February 25th the market price would be affected by an arbitrage against the value of the -- perhaps against the value of the consideration to be received as people might have seen it or affected at least by the terms of the merger proposal.

Q Would you explain to the Court the arbitrage procedure or the mechanism thatyou are now talking about?

A There was no real arbitrage at that point in time because there were no outstanding securities specifically in the proposal, but people would make some assessment, a range of values perhaps that shareholders of Schenley were to receive and that would affect the market price of the shares for that period of time.

Q What relationship would the market prices -- what relationship would the announcement of the merger terms on February 25 -- what effect would that have on market prices on that day?

A It could have any number of effects. There would be a lot of other factors involved as well that would affect market price other than that.

Q Would one of the effects be that it would put a ceiling on the Schenley market prices on that date?

A It would affect the market price, whether it would put a ceiling on it or not, I don't know, because the public probably was not in a position to actually evaluate what was being offered at that point. It certainly would affect the market price.

Q Would it affect it favorably or adversely?

A I suppose it depends whetheryou were short or long in the stock. It would affect it and I don't know what you mean by "favorably" or "adversely," do you mean send it up or down?

Q Well, would it extend it up, not down?

A I think it could affect it in either direction.

Q Did you know that the public announcement of the merger was made at or about the timeSchenley announced its 1970 earnings?

A Yes,sir, I did.

Q Did you know at the time that prior -- immediately prior to the announcement of the merger by the Schenley board of directors that the Schenley management had requested that trading be suspended in the stock pending the coming out of the announcement?

A Yes, sir.

Q By March 25, 1971, what information did you have concerning the possibility or probability that

Buckingham would be sold to Northwest Industries?

A Well, I think I had the information in October that transaction was announced as an agreement principle, and I was well aware of the fact that that transaction was not only a possibility but a likelihood.

Q Did you discuss the likelihood of that transaction taking place with any-- with Mr. Becker prior to March 25, 1971?

A I believe I did, but I don't have a clear recollection of that.

Q Were you told that the deal was going ahead? Were you told before March 25 that the sale was going to take place?

A Well, I am not sure that he knew that the sale was going to take place. He planned on the sale taking place, I believe it was in the proxy statements, and the assumption in my reasons was that it was taking place.

Q And you knew this by March 25?

A I believe I did.

Q And did the drafts of the proxy statement that you saw up until that time tell you that?

A I would have to take a look at the proxy to be sure, but my recollection is they did. But if you would show me a proxy -- what was in the proxy I saw.

THE COURT: Wait for a question, please.

Q We have the proxy statements, we have the dates on them.

MR. ODELL: I would like to go ahead, your Honor, without getting involved in the proxy statements.

THE COURT: Go ahead.

Q Did you prior to March 25, 1971, inquire of Mr. Becker what use Schenley intended to make of the proceeds from the sale of Buckingham?

A I am sure I might have asked that question, but I don't recall specifically.

Q Well, do you recall what you were told?

A No, I recall what my reasoning was with respect to the Buckingham sale and coming to a determination on fairness. I don't recall specifically any conversation with Mr.Becker about it.

Q Well, we will get the reasoning in a minute, but wouldn't your reasoning be affected by the probability of a sale or no sales?

A Yes, sir, of course.

Q Now tell us what your reasoning was without you knowing what that probability was?

MR. SILVERMAN: If your HOnor please, that is not fair.

THE COURT: Sustained.

MR. ODELL: I don't think so, your Honor. I think the man is --

THE COURT: You are pressing now. I didn't find that I would get a meaningful answer from that question phrased as it was.

Q Well, tell us what your reasoning was.

A About what?

Q Your reasoning.

A About what?

Q You mentioned that you had certain reasoning about the effect of the sale of Buckingham, is that right?

A Well, my reasoning was that Schenley was losing one-third of its earnings from the sale of Buckingham, and that this would have some effect on the value of Schenley.

Q Did you know by March 25, 1971, that Schenley intended to purchase these 7-1/2 Glen Alden debentures from Glen Alden and then distribute them to the shareholders of Schenley?

A I don't recall if I knew by March 25th what the actual form of the transaction was ultimately going to be. I really didn't consider that important.

Q Well, did you consider it important to your

determination of fairness of this merger how much cash Schenley had that was surplus to its needs?

A What do you mean by "surplus"?

Q Cash that was not needed for the day-to-day operations of its business.

A Well, I wasn't sure that there wasn't any cash that wasn't needed in the operation of its business, but I certainly considered Schenley's cash position, yes.

Q Did you make any inquiries as to whether Schenley had any cash --

A Certainly.

Q -- surplus to its needs, assuming the sale of Buckingham went through?

A Again, Mr. Odell, I am confused by what you mean by "cash that was surplus to its needs." Schenley had a considerable amount of indebtedness and they had some cash that was offsetting that of a substantial amount, but certainly they could have paid off their debt with their cash. They could have done any number of things with their cash and I was familiar with what I think most of the alternatives were.

Q What were the alternatives as you knew them the

A Well, again the alternatives that any management would have. They could increase their inventory, they could

pay down indebtedness, they could reinvest that cash if they had the opportunity to do so, and I was aware of that.

Q Did you make any inquiries with respect to Schenley's plans to use these proceeds for any one of these three purposes?

A Well, I was told that, as is stated in the proxy statement, that a substantial amount of the cash was going to go upstream to Glen Alden upon consummation of the merger, and had it stayed in Schenley, as I said, they might well have reduced their indebtedness or done any number of things, but really, that wasn't something that I was particularly concerned with at that point because I was already told that they were -- you know, weren't in that position.

Q Were you told how much cash was going to be paid upstream to Glen Alden?

A By March 25? I am not sure I knew precisely how much cash was going to be paid.

Q Do you know approximately how much cash assuming the Buckingham sale was consummated?

A I knew there was going to be a substantial amount of cash and I knew -- you suggested an earlier proof suggested a figure of $81 million, and so that if I had seen those proofs I would have known that that perhaps was

going to go upstream.

Q Well, apart from what the proofs told you that you talked about, did you discuss the question of how much cash was going to go upstream to Schenley -- upstream to Glen Alden with any of the directors of Glen Alden?

A The only directors of Glen Alden I spoke to, as I previously stated, were Mr. Chernow and Mr. Becker. I was aware of the fact that Schenley was going to get proceeds from Buckingham and a substantial amount of those proceeds were going to go up to Glen Alden.

I recognized Schenley's balance sheet position because it was fully disclosed to me and any questions I had I asked, but I don't specifically recall what questions I asked in this area.

Q Well, in passing on the fairness of the terms of this merger, assumption that Schenley had $81 million of cash that was going upstream, to what extent would the existence of that amount of cash affect your opinion as to the fairness of the terms of this merger?

A Well, very little, really. The point is that if Schenley were not going to be merged in Glen Alden and somebody asked me what the value of Schenley was, and one had to make a number of different assumptions as to what they might have been able to do with their cash, it again

could have been any one of a number of things, but that would have been a hypothetical situation and there is a hypothetical or was a hypotehtical spelled out in the proxy statement which was that a substantial amount of that money was going to be applied to the reduction of short term indebtedness.

Now, I am not really clear on the question you are asking me.

Q Pardon me?

A I am not really clear on the question you are asking me, because as I understood your question it was an academic question as I saw it at that time.

Q Were you evaluating the worth of Schenley before this cash went out or while this cash was still in Schenley's treasury?

A I was really evaluating what the shareholders of Schenley were receiving for what they had, and what they had really was stock in Schenley that the market had ascribed a value to over a long period of time, and I was really relating to that question, and in the course of that analysis, after coming to the conclusion that market value was a primary determinant, I went to other areas to really discern whether or not that market was a valid market and a real market, and how other indicia of value really are

tested against the market price, and I went into areas of earnings and price/earnings ratio, and book value and so forth, andin the course of that analysis, I considered Schenley's balance sheet. I don't know if that answers your question, but that is the best way I can describe what I did.

You see, Mr. Odell, Schenley again --

THE COURT: Now, please. Unless you want to clear up something in a prior answer you feel is not fairly stated, there is no question pending before you.

Q Did you want to add something to your previous answer?

A Well,yes, I did, if I may.

Q Go ahead. That is, if the Court permits you.

A In the sale of Buckingham, Schenley lost a considerable amount of earnings and my analysis really with respect to Schenley was to determine far its shareholders -- what the chances were of replacing those lost earnings which if that cash stayed in Schenley would have to be utilized by Schenley for some purpose somehow, which could be in debt reduction or any number of other areas, and I think I described in my affidavit that the consent decree made it impossible for Schenley to purchase another Scotch, that there were some problems of a

Department of Justice nature purchasing a large company, the operating management of Schenley itself did not have operating experience in diverse industries, and I did not feel in my analysis that that cash would be reinvested probably with a rate of return that it had in its investment of Buckingham.

Q What I am somewhat at a loss to understand from your telling us is that in your evaluation of Schenley, the fact that it had, we will say $81 million or $100 million of cash that was going out would play no part in your evaluation of the worth of the Schenley shares so long as the market prices didn't reflect the announcement that so much cash was surplus to the needs of Schenley?

A Well, cash is worth what it can earn.

MR. SILVERMAN: I object to the form of that question.

THE COURT: Do you understand the question?

A If you could rephrase it that would be helpful.

THE COURT: All right, I sustain the objection.

Q Did the market prices of Schenley at the time of this merger reflect the existence of at least $100 million of surplus cash that Schenley had, assuming the merger -- the sale of Buckingham went through?

MR. SILVERMAN: I object to the form of that

question. I don't know what $100 million of surplus cash means.

THE COURT: Sustained.

Q Mr. Shuman, did there come a time when you knew that Schenley in connection with this merger was going to buy these debentures from Glen Alden and pay out some $17 million in cash in order to consummate this merger and acquire the minority interest in Schenley stock?

A Certainly.

Q And you knew that that $100 million roughly was going to go out of Schenley, is that correct?

A Yes, correct.

Q And my question to you is, is the fact that Schenley had $100 million in cash that was going out, for whatever purpose, or for this particular purpose, did that -- what part did that fact play in your appraisal of the fairness of the terms of this merger?

A Almost none.

Q In making that determination --

THE COURT: Why is that so?

THE WITNESS: Well, as I tried to describe to you before, Judge, Schenley lost in the sale of Buckingham approximately a third of its earnings, and in evaluating the value of Schenley, let's say on a going-concern basis, I

would be concerned with how those earnings would be re-invested. One of the assumptions that was made in the proxy statement, for example, is that they would be investedin the reduction of short term indebtedness. One could make any number of possible assumptions and I tried torelate to those, I thought Schenley would be under some inhibition in investing those proceeds at the same rate of return that it had invested in Buckingham, because they couldn't for example buy another Scotch, they were in the liquor business, the whiskey business, they already were dominant factors in bourbon and blended whiskey in this country.

There really in my opinion was no place they could go to adequately invest those funds and it really wasn't relevant to me that now those funds were going up-stream to Glen Alden as opposed to any other place in the course of my analysis.

THE COURT: As far as you could see they couldn't do any better with it anywhere else is what it amounts to?

THE WITNESS: That's right.

MR. SILVERMAN: Your Honor, I would rise to voice an objection to this entire line of questioning unless my friend beings to relate this to some conspiracy

or some failure to disclose in the proxy statement.

I thought that that was the purpose of this exercise.

THE COURT: I assumed that we were endeavoring to nibble away at the top of page 5 and the validity of the opinion that it was fair and equitable.

MR. SILVERMAN: It is my submission, your Honor that the validity or the accuracy of that opinion is in a very real sense an irrelevancy, although I am perfectly willing to have my friend, Mr. Shuman, attempt to justify it it is irrelevant if it were honestly given. The failure to disclose-- this is not a lawsuit against Allen & Company for having given a wrong opinion. This is a failure to disclose in a proxy statement. Now, we disclosed what they said. If what they said was wrong, that is why you hire experts.

jgh 1 Shuman-direct

T7 THE COURT: I had thought that Mr. Odell's position was, and I state this as his position, that the Allen & Company opinion was given as window dressing for this particular purpose and that it was not based upon the proper factual workup that should have been made.

Isn't that what your position is, Mr. Odell?

MR. ODELL: In part that is so, your Honor.

MR. SILVERMAN: I didn't get that, your opinion.

THE COURT: He says that in part that is so.

MR. SILVERMAN: In part that is so?

THE COURT: In part that is so.

MR. SILVERMAN: If your Honor please, that may be my friend's position. But if that is unaccompanied by some statement that they deliberately, knowingly made a bad analysis --

THE COURT: That is what I thought he was endeavoring to prove.

MR. SILVERMAN: Knowingly made a bad analysis.

THE COURT: That is what I thought he was endeavoring to prove.

MR. SILVERMAN: If he gets to that point, fine. If not, I will rise again to object because so far we haven't gotten to that.

THE COURT: I had assumed that this was an allegedly

1 jgh 2 Shuman-direct

2 conspiratorial opinion that was given so that this language

3 could be put in this proxy and was in fact not so.

4 I think we are all clear as to what the plaintiff's

5 position is.

6 BY MR. ODELL:

7 Q Mr. Shuman, let's take this $100,000,000 that

8 was going out. You considered the alternatives that

9 Schenley had for the use of this money, and one of them

10 was that it was to be used to pay off indebtedness, is that

11 correct, short term indebtedness?

12 A That was the alternative that was pursuant to

13 the assumptions that were in the proxy statement.

14 Q And if the money was used to pay off short term

15 indebtedness, how much in interest savings by paying off

16 short term indebtedness would Schenley achieve?

17 A Oh, it was approximately $8,000,000, as I recall,

18 pre-tax.

19 Q How much?

20 A Approximately $8,000,000 pre-tax, as I recall.

21 Q Assuming roughly $100,000,000 was used for that

22 purpose.

23 A Well, that was your assumption, I think.

24 Q And was it your opinion that Schenley's earnings

25 were worth approximately 13 times its after tax earnings?

jgh 3 Shuman-direct

A I believe I said 11 to 13 times.

Q 11 to 13?

A Yes.

Q Well, let's take 11.

THE COURT: Mr. Odell, before we get too deeply into this, do you expect to have, by a fair preponderance of the evidence in your view, proof that would show that Allen & Company was in bad faith in giving an opinion that this was fair and equitable?

MR. ODELL: Your Honor, yes.

THE COURT: You do.

MR. ODELL: Yes. And I hope to do it to some extent through Mr. Shuman and through these next series of questions I am about to ask.

THE COURT: All right. Go right ahead.

BY MR. ODELL:

Q Now let's assume that you were figuring an 11 percent capitalization rate of Schenley's earnings in determining its value and now --

A Excuse me. Not 11 percent.

Q 11 times. And we have now reduced Schenley's interest costs by the application of a hundred million dollars at 8 percent to some $8,000,000, or roughly $4,000,000 after taxes. Is that correct?

A Yes, sir.

Q And if you multiply your times earnings factor of 11 to that $4,000,000, what is the product as to the value of that $100,000,000?

A Well, the product of your arithmetic is $44,000,000. But you've left out the earnings of Buckingham that this was supposed to replace.

Q But those earnings have been gone now and we are now trying to evaluate the worth of a hundred million dollars in cash in a company like Schenley, and by your method of using 11 times that $4,000,000 post-tax income from the investment of that money you arrive at the value of a hundred million dollars as being $44,000,000, is that correct?

A No. I would --

MR. SILVERMAN: Objection, your Honor.

A (Continuing) I never said that I would value earnings on cash at 11 times. I would not give a bank account the same multiple that I would give a going concern.

Q Well, what would you give a bank account?

A Whatever its rate of interest would be.

Q It would be less than 8 percent?

A It would depend and vary from time to time. But I wouldn't give it a multiple that would be very

jgh 5 Shuman-direct

substantial.

Q I'm sorry?

A I said I would not give it a multiple that would be very substantial. There are companies, Mr. Odell, for example, that have nothing but cash in them and sell at a discount in the market place from that cash.

Q Yes. But I would like to just stay with Schenley for a while and your determination of the fairness of the terms of this merger.

My first question is, you said something to the effect that a bank account would be worth what? More than 11 times earnings or less?

A I don't think I answered that question. But I believe it would be worth less. You see,a price/earnings ratio has inherent in it an assumption about growth.

Q A what?

A An assumption about growth compounded over a period of time. And when we talk about a bank account, we are talking about a very small compounding factor.

Q Well, if we are talking about a bank account or cash, according to your principles in the valuation that you followed, the hundred million dollars in cash in Schenley is not worth a hundred million dollars; is that what you are saying?

A For what purpose?

Q For what purpose?

THE COURT: Mr. Odell, I'm the one who has to understand this in the final analysis, and as I understand what this gentleman has been saying he has just been thinking there was cash, he gave an assessment based upon the fact it was cash and what were the uses that were available for that cash, and given those uses that were available he gave it no special consideration in this case because he saw no better use, as a practical matter, than to buy the Glen Alden debentures with it.

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Am I over-simplifying it?

MR. ODELL: He didn't say that, your Honor, not at all.

THE COURT: In terms of return on that cash?

MR. ODELL: No, he didn't even say that.

THE WITNESS: What I said, your Honor, was that certainly at best I did not see a use for it that could replace the earnings of Buckingham that were lost to get it.

THE COURT: Right. And, given other alternative uses, this was the equivalent of other alternative uses.

THE WITNESS: Yes, sir.

BY MR. ODELL:

Q Mr. Shuman, did you see page 43 of this proxy

jgh 7 Shuman-direct

statement in its final form?

A Certainly.

Q The section dealing with the pro forma cash?

A I'm sure I did.

Q And that shows the application of approximately $100,000,000 that would produce $8,040,000 in reduction of interest on short term debt through the application of that $100,000,000, or roughly $4,000,000 as being the post-tax income from the investment of $100,000,000 in the reduction of short term debt.

You understood that, didn't you, as being reflected in this proxy statement?

A I'm a little confused by your question. If I could see the proxy statement --

Q Sure (handing).

A Could you repeat the question, please?

Q I'll repeat the question.

You saw page 43 of this proxy statement.

A Yes, sir.

Q Did it form a basis for your opinion that the terms of the merger were fair and equitable?

A I think I stated what the basis for my opinion was. This was taken into consideration, but it did not form the basis for my opinion

Q Well, in your opinion did you apply a times earnings factor to this income per share of $2.18?

A I think I applied a times earnings factor to that figure and to the figure of $2.64, both.

Q All right. What was the times earnings factor you applied to the 2.18?

A Roughly 13; and roughly 11 to the 2.64.

Q All right. So that, applying your 13 times earnings factor to the 2.18, by doing so you placed a value of $52,000,000 on approximately $100,000,000 worth of cash that Schenley had in its bank, is that true?

MR. SILVERMAN: Objection.

THE COURT: Overruled. Let's see.

Can you deal with that qustion as it is framed?

THE WITNESS: No, I cannot.

THE COURT: Sustained.

Q Well, does the $2.18 per share that is shown here at the bottom of page 43 as the income before extraordinary gain on Schenley reflect an addition to Schenley's income of some $44,000,000 after taxes resulting from the reduction of its short term debt?

A After the sale of Buckingham.

Q After the sale of Buckingham.

A Yes, it doe..

Q And did you apply any different multiples to the some $4,000,000 representing that source of post-tax income than you did to the balance of Schenley's earnings as are reflected in that total figure of 22,543,000 of income before extraordinary gain?

A For this purpose I did not, no.

Q And would you tell us in what respects it was fair and equitable to the minority stockholders of Schenley to have a hundred million dollars of Schenley's cash being given an equivalent value on an earnings basis of $52,000,000? Was that fair treatment to the minority stockholders of Schenley?

A Well, I think, if I did it on an earnings value, I would have given it a lower multiple.

Q Well, would that have been fair?

A So the answer to the question that you asked is yes, I think it was fair and equitable to the shareholders of Schenley.

Q Wouldn't you consider the alternative that the hundred million dollars could be paid out to the stockholders of Schenley?

A I didn't consider that at all. I thought it was totally unrealistic.

Q What made it unrealistic?

A I didn't feel that management would reasonably consider that.

Q Did you discuss it with management?

A I saw no reason to discuss it with management. But --

Q Did you discuss it with the management of Schenley?

THE COURT: The answer is no?

THE WITNESS: The answer is I don't believe I did. I thought it was the managment of Schenley that you were referring to.

Q In arriving at your appraisal of the fairness of this merger, did the cost reduction program that you referred to in your affidavit play a factor in your determination as to the rate of Schenley's growth in sales as it might have been affected by that cost reduction program?

THE COURT: You are getting off into a new subject, are you not?

MR. ODELL: Yes, your Honor.

THE COURT: Then we will take our luncheon recess at this point. 2:10.

(Luncheon recess.)

1 PM

meb-1 AFTERNOON SESSION 635

2:10 P.M.

S T A N L E Y S. S H U M A N resumed.

THE COURT: Go ahead, sir.

DIRECT EXAMINATION (continued)

BY MR. ODELL:

Q Mr. Shuman, before the March 25, 1971 meeting wit the board of directors that you testified about this morning had you prepared any notes in preparation for that meeting with the board?

A I am not sure. I am sure I had some notes but I don't recall if I had any formal notes of any sort.

Q Have you produced any pursuant to the subpoena here?

A Yes, I produced anything that was in my file.

Q Pardon me?

A I produced anything that was in my file.

Q Is there someone here who can look through that file and look for those notes while we go on with other questions?

A Yes. What kind of notes are you referring to?

Q Notes you used in preparation for the meeting in which you outlined --

A You mean that I might have brought to the meeting with me?

* * * * * * * * * * * * *

6 Q In connection with the formulation of your opin-
7 ion for this merger, Mr. Shuman, didyou have occasion to loo
8 at the affidavit of Mr.Greenberg that was used in the 1968
9 tender offer where your firm among others was one of the
10 dealer managers?
11 A I was aware of Mr.Greenberg's affidavit and
12 it is in my files, so I assume I did look at it.
13 Q Well, did you read it before you formulated
14 your opinion in this case?
15 A I believe I did. As I said, it was in my
16 file and if it was in my file I assume that I read it.
17 Q Just so there is no question of difference of
18 identity, I am going to show you a copy of Mr. Greenberg's
19 affidavit and ask whether this is the affidavit --
20 Plaintiffs' Exhibit 6 in evidence, your Honor -- which you
21 had occasion to look at.
22 A Yes, sir.
23 Q Did you in the formulation of your opinion
24 in this matter have occasion to look at the affidavit of
25 White Weld & Company in connection with the merger of

Buckingham with Schenley in 1969?

A Yes,sir, I believe I did.

Q And again so that we don't -- I show you Plaintiffs' Exhibit 80 for identification and ask whether that is the affidavit that you saw.

A Yes, sir.

Q Did you see it before giving your opinion on March 25, 1971, for the board?

A I can't be positive. Again it is in my file and I collected a whole quantum of information during the entire time I was workingon this matter, and I can't differentiate between before March 25 and after March 25 for that purpose.

MR. SOLVAY: Excuse me, we have, I think, isolated the documents as nearly as we can. They are in these files here alongside of Mr. Shuman.

MR. ODELL: All right.

Q Mr. Shuman --

MR. ODELL: Your Honor, may I withdraw the question I have before him so we can work with these.

Q Did you prepare any work papers which compared the growth of Schenley sales and earnings between 1967 and 1970 with other distilling companies?

A No, I don't believe I did. I think I did

between 1966 and 1970.

Q Do you have the papers that you prepared showing the growth between '66 and '70?

A I am not sure whether I have precise papers or not, Mr. Odell, for that. I know that I have -- Mr. Odell, may I have my associate look through the file because it may take time to locate several exhibits.

Q Certainly.

While your associates are looking for those papers, I would like to ask you to read Paragraph 16 of the White Weld affidavit and tell me whether, before the merger before March 25, 1971, you read those pages.

MR. SILVERMAN: Your Honor, I again must object to the relevance of this.

THE COURT: Well, I assume there is something in there that is claimed to be contradictory to the opinion arrived at. He is going to ask the witness how he treated that kernel of alleged information.

Am I right about that?

MR. ODELL: Your radar is working very well, your Honor.

MR. SILVERMAN: Does your radar also encompass Mr. Odell's representation that he is in some way going toshow some fraud or evilness about Mr. Shuman's activities

which he said would be answered in the next few questions before lunch?

THE COURT: He said that before lunch, so I assume that representation still stands.

MR. SILVERMAN: The "next few questions."

A I have read the paragraph.

MR. SILVERMAN: What paragraph did you show the witness?

MR. ODELL: Paragraph 16.

Your Honor, may I show you Paragraph 16 or if you prefer I would read it into the record.

THE COURT: No, it is not in evidence at this point so just let me look at it.

(Pause.)

Q Mr. McK. Rees, the draftsman of this affidavit in Paragraph 16 of this affidavit, after talking says as follows.

MR. SILVERMAN: If your Honor please, I will object to reading the affidavit in evidence.

THE COURT: Sustained.

Do you want to ask him if he read it and what view he took of it, if any?

MR. ODELL: I want to ask him what action he took after reading this affidavit.

Well, I will.

Q Would you tell us what inquiries you made to people at Schenley after reading --

MR. ODELL: I would like to read portions of this affidavit to him on a particular subject matter.

THE COURT: There is no need to do that. Just ask him if he read that and what did he do, if anything.

Q Did you make any investigation or inquiries of people at Schenley with respect to the increased efficiency and improved marketing techniques that were designed to produce for Schenley higher profit levels?

MR. SILVERMAN: Objection to the form. That is assuming a fact not in evidence.

THE COURT: Sustained.

jgh 1 Shuman-direct

T2 MR. ODELL: There is an opinion of someone who was hired by Buckingham, your Honor, to give this opinion on the basis of --

THE COURT: Sustained.

Mr. Shuman, did you read that paragraph?

THE WITNESS: Yes, sir, I did.

THE COURT: What did you do, if anything, after you read that paragraph, having been made aware of its contents?

THE WITNESS: Well, I believe it was one of a number of matters that I read about Schenley and the plans that Schenley management had, really, to improve its performance over a period of time. And to the extent that they accomplished that, it was reflected in the earnings of Schenley over the time that I was looking at it, which in turn was reflected in the market price, which I took very much into consideration.

Q Was it also reflected in the growth in sales and earnings of Schenley?

A To the extent that it was successful, it was reflected in whatever growth Schenley managed to experience.

THE COURT: I would assume there would be no objection if I were to receive that one paragraph as being a paragraph of an affidavit that Mr. Shuman read, and for

no other purpose.

MR. ODELL: All right. That is acceptable.

MR. SILVERMAN: No objection.

THE COURT: It will be received, that one paragraph.

MR. ODELL: I offer it in evidence for the purpose of what is said in paragraph --

MR. LEVIN: Not the entire affidavit.

THE COURT: It will be received to the extent I've already ruled.

(Plaintiffs' Exhibit 80 for identification was received in evidence to the extent indicated in the Court's ruling.)

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BY MR. ODELL:

Q Mr. Shuman, prior to March 25, 1971, did you read the report of R.A. Graham to Mr. Riklis dated February 6, 1967?

A I believe I did, yes, sir.

MR. ODELL: That is Plaintiffs' Exhibit 5. May it be admitted in evidence?

MR. SILVERMAN: Admitted under your Honor's specific ruling.

(Plaintiffs' Exhibit 5 for identification was received in evidence.)

xx

Q Did you read the annual report of Schenley for the

year ending August 31, 1968?

A Yes, sir.

Q And the annual report for the year ended December 31, 1969?

A Yes, sir.

Q And did you read the annual report for the year ended December 31, 1970?

A Yes, sir.

Q And are you able to tell me now whether you read the 1970 annual report in the form that I show it to you, which is the form in which it was sent out, before the March 25th meeting?

A I'm not able to tell you that.

Q I show you a financial statement of Schenley internally prepared, which has been admitted in evidence as Plaintiffs' Exhibit 13, and ask whether before March 25, 1971, you had seen this financial statement.

MR. SILVERMAN: What is that number?

MR. ODELL: 13.

A I can't be sure whether I saw this before March 25 or not. I'm sure that I saw the information contained therein, but I'm not sure if I saw this particular document.

Q Well, could you tell me whether you saw it after March 25th and before June 7, 1971?

A No, I can't.

MR. ODELL: Do you have that report there?

MR. SOLVAY: I believe so, Mr. Odell (handing). No, no. This is the prior inquiry you made. I'm sorry.

MR. ODELL: May I continue with this line, your Honor, and get back to his notes?

THE COURT: Sure.

Q I show you Plaintiffs' Exhibit 14, which is a financial statement internally prepared by Schenley for the year ended December 31, 1969, and ask whether you saw this financial statement before March 25, 1971.

A Again, I can't be sure, Mr. Odell.

Q I'll ask the same question as to whether you saw it before June 7, 1971.

A I believe I did. But, again, I can't be sure. I know that I was aware of all of the information substantially that was included therein. I saw quarterly reports. I saw the annual statements. I don't believe there is anything material contained herein that I wasn't aware of or that I had seen.

Q Would you look at this report, Plaintiffs' Exhibit 14, and look at that column entitled "Schenley's statement of consolidated profit and loss," which shows the profit

and loss for Schenley only for the year 1969 as compared to the year 1968, and you'll see that that report states that Schenley's earnings for the calendar year 1968 were $7,719,800-some and for December 31, 1969, they were $15,027,841.

You said you saw this report when you saw those figures that I just read?

A Yes, I believe I did.

Q And did you ask any questions as to what accounted for the difference in earnings between the calendar year '68 and '69?

A I'm sure I did, Mr. Odell. I was looking, however at the consolidated figures, which also show a substantially similar differential, because I was dealing with the consolidated company at that point.

Q Well, there was a point in your formulating an opinion about the fairness of this merger where you looked at the Schenley earnings without Buckingham, did you not?

A Yes, of course.

Q All right. My question is, did you inquire as to what caused that difference between the 1969 and 1968 earnings?

A Yes, again I'm sure I did.

Q And whom did you ask?

A Mr. Chernow

Q And what were you told by Mr. Chernow?

A I was told that a substantial amount of transitional costs were reflected in 1968, and I also believe that -- my recollection is vague at this point -- there were a change in the method of supplying the distributors with product during 1968, the end of 1968, which would have occasioned substantial return of inventories to Schenley in 1968.

b3 Q And therefore was responsible for lower earnings in 1968, is that correct?

A Was a factor involved in the lower earnings.

Q Right. In your discussions with Mr. Chernow, did he have occasion to refer to a cost reduction program that Schenley was engaged in in 1969?

A Yes, sir.

Q And what did Mr. Chernow tell you about that cost reduction program?

A Well, my recollection is that that cost reduction program was implemented in 1968 or '69, I believe 1969, and I believe it carried over until 1970, or at least the full force and effect of it, since it was a gradual program, really wasn't felt until the 1970 figures, and that the amount was approximately seven and a half million dollars, pre-tax.

Q The amount of the cost reduction program was

seven and a half?

A That's right; the net savings of the cost reduction program.

Q Mr. Shuman, was what you were told by Mr. Chernow with respect to transitional costs as well as the cost reduction program incorporated in the affidavit of June 7, 1971?

A Yes, it was.

Q And was it stated in some detail in that affidavit?

A There was an exhibit to the affidavit. I don't believe the text of the affidavit had it in great detail, no.

Q I ask you to look at a copy of that affidavit, which is Plaintiffs' Exhibit 49, and tell me whether paragraph numbered 25, which begins on page 14 of the affidavit and goes through page 15 and the first five lines of page 16, states accurately what your understanding was of this cost reduction program as well as the transitional costs thatwere incurred by Schenley.

A Yes, sir.

Q It does accurately state what your understanding was of those two factors.

A It accurately states what my understanding of

the size of those two factors were and the arithmetic that--the impact that it had on the differential earnings between 1968 and 1970.

MR. ODELL: Your Honor, I would like, at this point at least, to offer in evidence Plaintiffs' Exhibit 49 for identification insofar as it relates to paragraph 25, as Mr. Shuman has testified with respect to the contents of that paragraph.

Would you like to see it, your Honor?

MR. SILVERMAN: I have no objection.

THE COURT: All right. There being no objection, it is received in evidence.

MR. SILVERMAN: Your Honor, do I understand that Mr. Odell is at some point going to offer this affidavit? Or is he going to offer bits and pieces?

MR. ODELL: I tried to offer it all and you objected. I would like to offer it all, and I believe I will, by the time I finish with Mr. Shuman, establish the admissibility and the authenticity and the relevancy of this affidavit.

MR. SILVERMAN: Your Honor, is this an offer of the affidavit?

THE COURT: Let's treat it as that. Then what?

MR. SILVERMAN: May I have a moment or two of voir

dire to determine whether I will object.

THE COURT: All right.

MR. ODELL: Your Honor, may we confine this to 25 to begin with? It is my offer. If we go on to other paragraphs, let's take them one by one, as he looks to do it.

THE COURT: That could result in an awful lot of time being wasted.

If Mr. Silverman has no objection to the vast bulk going in, we can put it in all at once and then you have the same privilege of using it as you have now.

MR. ODELL: Of course.

THE COURT: Why don't you look, Mr. Silverman, and have your voir dire.

VOIR DIRE EXAMINATION

BY MR. SILVERMAN:

Q Mr. Shuman, do you have that affidavit before you?

A I do, sir.

Q What is the date of the affidavit?

A June 7, 1971.

Q That is after your opinion given to the board and after your oral report to the board, is that correct?

A Yes, sir.

Q In what proceeding was this affidavit submitted?

A It was submitted in two proceedings, as I

1 understand it, one in Delaware and one in the Federal
2 District Court in New York in an action for preliminary
3 injunction of the merger.
4 Q Your affidavit was submitted both in Delaware
5 and in the Southern District here in New York?
6 A Yes, sir.
7 Q And the action in Delaware, do you know what that
8 action was?
9 A It was my understanding that there was a lawsuit
10 and a motion to enjoin the merger, and there was an action
11 on a motion for preliminary injunction.
12 Q On the grounds that the merger was unfair?
13 A Yes, sir.
14 Q Was this submitted in opposition to such a motion?
15 A Yes, sir, it was.
16 Q And did you read any affidavits from the other
17 side to which this is directed?
18 A Yes, sir. I read two such affidavits, as I recall,
19 one from Mr. Goldstein of Burnham & Company and one from
20 Mr. Glick of David L. Grene & Company.
21 Q And is this affidavit responsive to the allegations
22 in those affidavits?
23 A Yes, sir.
24 MR. SILVERMAN: Your Honor, with those caveats I
25

have no objection to the admissiblity of the affidavit subject to the same representations that Mr. Odell has made with respect to Mr. Shuman's testimony, that is, that this in some way is connected with a scheme to defraud or a fraud or a conspiracy or something evil that Mr. Shuman has been involved in, and specifically not on the issue of fairness.

THE COURT: Mr. Odell, what say you to that?

MR. ODELL: I don't like to use all those awful sounding words to characterize Mr. Shuman, and I'm not talking about a conspiracy or all those other terrible things he is mentioning.

All I am trying to offer this affidavit for is for proof as it relates to what this man told the board of directors on March 25, 1971. He had testified earlier today --

THE COURT: How does that bear on anything in the proxy statement?

MR. ODELL: How does that bear on anything in the proxy statement?

Your Honor, it bears on the proxy statement insofar as page 5, paragraph 9 talks about Allen & Company, who gave this opinion as to the fairness of the merger. I believe your Honor has had occasion to read this before.

b4 And it bears on --

THE COURT: How does that bear on anything in the proxy statement?

MR. ODELL: Well, it bears in this respect, your Honor: that, as I said before, this paragraph 9 is a representation, really, to the investing public that in this merger between the parent and subsidiary, where the parents elected and selected the directors of this company, that an investment banker was hired to do a full scale inquiry as to the fairness of the terms of the merger and he came to the conclusion that the terms were fair.

I'm trying to prove, first, what the basis of his opinion was, and I will prove in the course of the additional evidence that I am going to produce that some of the reasons that Mr. Shuman gave for downgrading the value of the Schenley shares were not in fact valid or were not well based and in fact supported by the actual facts in the case.

THE COURT: Are you going to contend that that is more than a mistake of judgment at worst, because earlier, I had asked whether you were going to prove bad faith in the giving of the opinion, and you said you were.

Now, I don't detect that in what you now say.

MR. ODELL: Your Honor, I said it then and I think that the evidence that I will present shows that this opinion of fairness was not supported by facts that were true or facts that were accurate, would indicate bad faith on the part of the giver of the opinion as well as some of the people that gave him the information at Schenley on the basis of which he made this opinion or gave this opinion.

In other words, he received erroneous information, and I think whether he received erroneous information or whether he formed judgments based on facts which in fact did not exist, either one and both are relevant to the question of whether there has been adequate and full disclosure relating to this opinion of Allen & Company as stated in this proxy statement.

THE COURT: Now, this gentleman has not been asked, I don't think, what was the basis of his opinion.

MR. ODELL: Well, I have asked him, for example, where he got this information.

THE COURT: You haven't asked him what the information was,what were the factors.

MR. ODELL: I started to on this one question, and I intended to keep going that way, until I was interrupted.

THE COURT: We have gotten off into his affidavit and its admissibility and defer talk to somebody about something.

Would it be inappropriate to suggest that you ask him what were the factors that he used in arriving at the conclusion that the terms of the proposed organization were fair and equitable as he viewed them in May of 1971?

MR. ODELL: Your Honor, there isn't, except that I am dealing with --

THE COURT: After that is established, if you can pick them apart, so be it.

MR.ODELL: Your Honor, there are several answers to your question that I would like to give to you. First, we are going to get to what we contend are the true facts which make some of the facts stated here erroneous.

Second, I am faced with a problem that there is nothing extant except this affidavit that particularizes

the grounds for his opinion.

Now, I think this witness has testified sufficiently this morning to indicate that the information he received before March 25th was substantially the basis for the information contained as well in this opinion, so I think that this affidavit is proper evidence, relevant evidence, it tends to prove the existence of what the particulars were of his opinion.

Now, my next group of questions will go to him as well as to our own experts to show that some of the grounds given in this affidavit for finding this merger were not in fact true and the truth did not support the conclusions that his opinion is based on.

Now, your Honor, as far as I know, when you are dealing with experts, they can give any opinion you want, but the day has come when it has to be based on facts and the facts upon which that opinion have to be proven, whether it is proven by the proponent of the opinion or the opponent of the opinion, and I am trying my hardest to do it in exactly the way I have outlined to you.

THE COURT: Have you ever made a coherent statement in one place on this record as to what the basis of your opinion was?

THE WITNESS: I don't think I have been permitted

to, your Honor. But I would be happy to do that.

THE COURT: Are you in a position to do it?

THE WITNESS: I think I am.

THE COURT: Because we are now five years after the time.

THE WITNESS: Not in detail, but certainly in substance I am I believe able to do it.

THE COURT: Why don't you do that. I am going to put to you my question.

What was the basis of your opinion rendered to the board on March 25, 1971, that the terms of the proposed organization were fair and equitable?

THE WITNESS: My recollection is that the overriding determinant of fairness, as I saw it, was the long and consistent history of market values that were existent in Schenley's common and preferred stock, both, from 1960 on. Schenley, say from 1960 to 1966, had sold under $29 a share, except in 1966, I believe it made a high of 29-3/8 or something of that sort, they traded roughly in the range of $15 to $25 a share.

In 1967 there was a contest for control of Schenley between Lorillard and Glen Alden. That started in March of 1967. And I believe that the market price was affected by that contest for control up until the culmination

of the acquisition of control by Glen Alden in 1968 in the summer.

By that time, the market price had gone up to a high of about 57, and within approximately nine months after that transaction it had receded all the way down to its former levels, below 29 a share, and during the latter part of 1969, and all during 1970, and the beginning of 1971, the market price had been approximately 29 or below, although for some period in February of 1971, it had traded above that price.

So I observed that market history first of all.

And I analyzed the market place and found that since the merger of Buckingham in December of 1969, there were approximately between the preferred, which was -- and the common -- the effective number of shares trading were about 3.3 million shares of stock, 17,500 shareholders, the average trading during that period was 5500 shares a day, and I and my associates felt that that was a free marketplace for the shares of Schenley and that the marketplace sought its own level, and that that was the primary determination of value after taking a whole number of things into consideration, and I then did go further to test that conclusion to see if there was anything aberrational in the situation, that I might find that I felt was material

to lead me to believe that that market was not a free market or was not reasonably reflective of the information that the marketplace had, and I looked at factors concerning earnings, which included things such as comparable price earnings ratios, and the growth ratio of Schenley during this period, I took note of the fact, as I suggested to you before, that the sale of Buckingham caused Schenley, during the period that I was looking at it, to lose over a third of its earnings power, I looked at Schenley's inventory mix which indicated that they were heavily loaded in the areas of bourbons and blended whiskeys, which was an area of declining sales, relatively speaking, in the liquor industry in the United States, I took note of the fact that Schenley had a relatively weak brand grouping, that its primary sellers were Buckingham which had to be sold and Dewards which they didn't own, which was important insofar as -- or primarily insofar as earnings that come from something you don't own might be worthless than earnings that come from something you do own; I took a look at the book value after the sale of Buckingham and related that to the market price and again noted that the value that was being offered was consistent with the ratios of book value to market price that Schenley had historically sold at other than during this aberrational

period of contest for contro; I looked at the income that would be received by the Schenley shareholder on the debentures and the cash that he was receiving in exchange for his stock, and noticed that this was in excess of the dividend that they were receiving on the stock prior to the exchange, and when I was all through with that analysis and looking at all the relevant material which I had been given and which I requested, I came back to the beginning, which was that market price and market values were the most important determination, and so reported to the board of directors.

THE COURT: Go ahead, Mr. Odell.

MR. ODELL: Your Honor, if I understood or if I heard you correctly, shall I say, I take it that this affidavit has been admitted in evidence, and at least with respect to Paragraph 25 that I had offered it for.

THE COURT: Well, Mr.Silverman has consented that it go in --

MR.SILVERMAN: I have no objection to admissibility.

THE COURT: -- given the circumstances of its preparation.

MR. SILVERMAN: And the fact that I assume it will be related to what your Honor chose, I think, to term

a "conspiratorial effort" on their part, and which Mr. Odell said he complimented your Honor in having articulated his position, so that subject to the relevance of that, those allegations, let it go in.

THE COURT: It will be received.

xxx (Plaintiff's Exhibit 49 was received in evidence.)

BY MR. ODELL:

Q With respect to your testimony concerning -- in which you said that the full impact of the $7,500,000 cost reduction program was first reflected in 1970, bearing that statement in mind, can you tell me whether you had questioned Mr. Chernow at all as to when the full impact of this cost reduction program was felt as shown by the financial statements of Schenley?

A Well, as I said I received a schedule -- I will try to answer that as best I can -- I received a schedule from Mr. Chernow which appears as an exhibit to my affidavit which evidences the cost reduction program. I have no specific recollection of the questions I may or may not have asked Mr. Chernow about it, but I am sure we did speak about the substance of that exhibit.

Q Well, was there anyone besides Mr. Chernow who was the source of your information that the full impact

of this program was first reflected in 1970?

A On matters of that sort, certainly not. Mr. Chernow was the chief financial officer of the company and there would be no reason for me to speak to anybody else.

MR. ODELL: Your Honor, I intend to handle this, the truth of the matter, with Mr.Gardner, our accountant, who will testify after Mr. Shuman is finished.

I would like to go on with Mr. Shuman.

MR. SILVERMAN: I am not called upon to say anything about Mr.Gardner at this point.

THE COURT: No.

MR. ODELL: May I say this off the record to my friend Mr.Silverman.

THE COURT: No, let's go on with the questions, please.

Well, Mr. Shuman, as I understand it, your judgment of fairness and equitability of these terms came down to assuring yourself that in the forum of the market it had made a certain judgment and no other factor that you assessed on the side gave you any reason to reject the market's judgment?

THE WITNESS: In substance that is correct, and I do think that we entertained the relevant factors of it

leading to that judgment.

THE COURT: These various programs that are in a state of completion, in a state of incompletion, nothing having to do with those in the final analysis made you feel that the market had assessed the picture improperly?

THE WITNESS: That is correct.

THE COURT: All right.

Q Mr. Shuman, there were some notes produced here which I didn't get to before.

May I see those notes?

A Could you tell me again, if you would, Mr. Odell, what specific notes you would like, because I have a number of things here that my associates have given me and I want to make sure that I respond to exactly what you asked for.

Q I believe at the time I asked you questions about notes dealing with the growth in Schenley's earnings, Schenley without Buckingham's earnings and sales. I asked you what papers.

A Well, I don't -- I don't believe I have --

Q I am sorry, Mr. Shuman. I may have misled you, because I asked you two questions and I was thinking of the second one first. I think my first question was what notes hadyou used in preparation for use at the meeting of

March 25, 1971; that was my first question.

A Well, I am not sure that I prepared any notes for that meeting, because all the information that I required was -- that I had digested I had seen; the market information wsas not information that I had to prepare, it was prepared, it was a matter of public record --

THE COURT: I think what Mr. Odell is asking --

A I had no prepared speech of any sort.

THE COURT: YOu didn't have any notes in your hand when you addressed the board?

THE WITNESS: No, sir, I did not.

Q I think my next question was whether you had any notes or work papers that dealt with the question of the increases in Schenley's sales and earnings.

A Well, again I had all of the public financial statements, which is really what was out in the marketplace, and which was reflected in the market values, and I had the benefit of the discussion, whatever material is in my file, as I said, I can't really differentiate between the information that was there prior to March 25 and that which was there after March 25. I can give you whatever I have in my file that is pertinent to the question, but I can't be specific as to the date that it found its way there.

Q Well, you told the Court -- have you any notes

dealing with the increases in Schenley's earnings and sales between 1966 and 1970?

A I don't understand whatyou mean by "notes." They were a matter of public record, one could read them in the annual reports. I did read them and I did not require notes. They were very obvious what they were.

Q tid the annual reports break out Schenley's earnings from Buckingham's earnings?

A I don't believe the annual reports did, no, but certainly the information which you put in front of me before did, and I think I said I had seen that information. Information that the 10K's would have, or that certainly was a matter of public record.

Q Well, you told his Honor that after you had taken into consideration the study of market prices here that you had tested your conclusions with respect to market prices by looking at a number of other statistics, if you will, including, as I recall your talking about book values -- I don't know whether you mentioned price/earnings ratios.

THE COURT: He did.

A Yes.

Q -- information relative to the company's future prospects? And what I am asking you is what notes do you have, say, on books values that you used in connection with

the formulation of your opinion?

A Well, if you take a look at the -- again, Mr. Odell, let me try and be as clear as I can on this. Information was coming to me on a continuing basis, both orally and otherwise. I did not give a written report to the board on March 25, and therefore, I did not require a lot of information which I was able to digest, look at and study, to be put in writing for that particular board meeting. The only time that I reduced something to writing was in response to the litigation which we spoke about before. Much of that information then was formalized in the way of exhibits to that affidavit for purposes of the litigation.

Now, some of those -- in some of those instances, points that were made in the affidavit really were in specific response to points that were made in Mr. Goldstein's or Mr. Green's affidavit, and really were not material to my overall judgment that market value was the essence of my opinion at the board of directors in March, and although I did take into account the factors concerning earnings, as I indicated, and did very closely look at them from the publicly available information and the conversations that I had with Mr. Chernow and Mr.Becker.

Q This fee of $200,000 that you were paid, was that paid for the opinion you gave on March 25?

A Yes, sir, it was.

Q Pardon me?

A Yes, sir.

Q Entirely?

A Certainly.

Q Now, were your duties in acting as a financial advisor on the fairness of the terms of this merger -- was your engagement completed as far as Schenley was concerned when you gave your oral report on March 25, 1971?

A No, I think that in an opinion of this sort, one's obligation continues until the effectiveness of the proxy statement -- or perhaps even to the date of closing, if anything had come to my attention that would have caused me to change my opinion that I had previously given, I, naturally, would have felt obliged to come forward and state that, but nothing did.

Q Now, at the conclusion of your oral report to the board of directors of Schenley on March 25, did they ask you to put something in writing summarizing your opinion?

A That request was not made of me until substantially later, not immediately thereafter, as I recall, and I did deliver a letter dated June 3 to Mr. Seasonwine.

Q What was the request pursuant to which you

delivered this letter?

A Well, I believe it is in the preamble to the letter, and my recollection is that it was to summarize the remarks that I made orally so that they could append that to the minutes of the meeting.

THE COURT: Mr. Shuman, at some point, you authorized somebody to permit Pandick Press to put in this proxy statement, the fact that you had concluded that it was fair and reasonable?

A Yes,sir.

THE COURT: Do you recall when you did that, approximately?

THE WITNESS: Well, I concluded that it was fair and reasonable on March 25 and I am sure that I reviewed that on a continuing basis and the proxy is dated May 25, or 21, or whatever, and I would have been of the same opinion as of that date or else the proxy would not have gone out that way.

THE COURT: All right, okay.

MR. ODELL: Your Honor, I believe the letter of June 3, 1971, which Mr. Shuman testified to in his last answer, is part of the minutes, and it is attached to the minutes of the March 25th meeting, and I believe that is Exhibit 64 for identification -- it has been admitted in

evidence, I am sorry.

Q Now, is this June 3, 1971 letter, which I hand you, the letter thatyou sent on or about that time to the board of directors of Schenley?

A Yes, sir, it is.

Q And so far as you know now, would you say that it is an accurate statement of the material that you summarized to the board on March 25, 1971?

A It is an accurate statement of the factors that I took into consideration. This letter does not attempt to attach weight to any individual factors which I did do at the board meeting.

Q Well, is it an accurate statement of the subjects?

A Yes,sir, it is.

Q And the indicia of value that you discussed with the board of directors at that March 25th meeting?

A It is an accurate statement of the factors that we took into consideration.

Q And how long did that board of directors meeting take of March 25, 1971?

A I don't recall, Mr. Odell.

Q Can you give us any approximate idea of how long it took?

A I really can't. In fact I don't really recall whether or not I was there for the whole board meeting.

Q Do you recall how long your presentation to the board on the fairness of the merger took?

A No, I don't. Perhaps an hour or something of that order of magnitude, and whatever time it would take for questions and answers, maybe less than that.

Q Were there questions by any of the directors of you concerning --

A My recollection is that there were because in matters of this sort there usually are,but I have no specific recollection.

Q Well, was there any director present at that meeting that disagreed with your conclusion as to the fairness of this merger?

A I don't know if they agreed or not. They voted in favor of the merger. I don't recall the specific directors vote against the merger.

Q While you were present at the meeting at least there were no dissents expressed by the directors?

A There were questions, and I am sure the questions were probing questions but I did not get a feeling that anybody was against the merger.

Q One of the traditional indicia of value as you

described it in your June 3rd letter at page 3, that you enumerated in that first paragraph on page 3, was information relative to the company's future prospects.

Can you tell us what you had to say to the board of directors about Schenley's future prospects?

A I can tell you some of the things as I recall them. I noted that the assumption in the transaction was that Buckingham would be sold on or about at the time of the consummation of the transaction and that Schenley would lose a substantial portion of its earnings; that, as I discussed before, that its inventory mix, although somewhat bettered by present management since 1968, was still an area that was in a declining share of the liquor market -- these were things of course that I took note of that the directors I am sure were well aware of isnce it was their company.

But I made the observations of this sort really which would have been apparent to them and where apparent to me that would have affected Schenley on a relative basis in its industry as they would really relate to a growth of earnings per share over a period of time, and as that might be reflected in the marketplace.

Q What was the source of your information about the inventory mix of Schenley that was the subject of your

remarks on that point to the board of directors of Schenley?

THE COURT: Does that make a difference in the overall picture here?

MR. ODELL: Yes, sir.

THE COURT: How?

MR. ODELL: Well, again, your Honor, if I may add, the affidavit expresses his opinions about inventory mix, one of them being that Schenley had a larger supply of whiskeys six years old or older than any of the other whiskey companies. Now, that is one of the statements in his affidavit, and I am asking him who in Schenley gave him that information or what is the source of his information.

THE COURT: Do you propose to independnetly prove that his understanding that the inventory mix was improperly heavily in bourbon is false?

MR. ODELL: Your Honor --

THE COURT: Because if you are, who cares where he got it from?

MR. ODELL: There are two different questions here, your Honor. There is one question that Schenley's growth rate, because it is so heavily concentrated in bourbons its growth rate in the future would not "increase", to use a word.

I think the case sales on all the figures we have that we are going to introduce will show the contrary.

Secondly, his statement thatSchenley had an oversupply of six-year old or older whiskeys, I think I will be able to show you is rebutted by answers to interrogatories made by Schenley, and these are factors which Mr. Shuman uses, as he has testified here, as being facts that limited Schenley's future prospects in terms of earnings and sales.

THE COURT: Well, he didn't quite say that. He said that considering that factor he still didn't feel that that factor affected his basic judgment that the market price reflected value and therefore the debenture price was fair and equitable.

THE WITNESS: Yes, sir.

THE COURT: That is what it amounts to. That he wasn't going to take other than market value because of inventory mix, even though it was negative, and that he wasn't going to assert positive factors in lieu of the market price either.

Am I phrasing you accurately?

THE WITNESS: Yes, to determine why Schenley sold at a relatively low earnings ratio, maybe there was a factor active in the marketplace I didn't understand,

and I was trying to determine whether or not these other areas might lead me to pursue that line of reasoning, and it simply didn't, and we made quite an extensive survey of these other relevant factors.

(continued on next page.)

End 4

jgh 1 Shuman-direct

MR. ODELL: Your Honor, I really would like to rebut some of the things said in his affidavit by the facts as we have them. Whether we need Mr. Shuman for that --

THE COURT: Mr. Odell, I'm only on the one question of what is the relevance of from whom he learned the inventory mix figures. That's where I'm at.

MR. ODELL: Your Honor, if you start with the assumption that market prices tells it all in a situation like this and Mr. Shuman's word on that is a word from heaven that can't be disputed, then there is nothing else that I think I can say.

I think there are a number of questions that will come up and a good degree of proof on our part, as a matter of law as well as a matter of fact, that market prices are not the sole criterion of valuing a situation like this.

THE COURT: Even assuming that reasonable men can differ, that doesn't demonstrate that this wasn't a reasonable judgment.

MR. ODELL: Your Honor, isn't that something to be determined after all the facts are in?

THE COURT: True. But --

MR. ODELL: And shouldn't I be permitted to present and amplify those facts?

think, the wine division or any sales of bulk whisky. Not does it accurately reflect necessarily case sales, as I said, because of the difference between case sales and depletion.

Q Well, did you actually see case sales figures for those three years, as prepared by Schenly?

A I believe I did, yes, sir.

Q And were those case sales figures larger than these depletion figures that are shown in Exhibit 13?

A My recollection is that they were. But I'm not positive.

You see, in any type of distribution business, though, I think the movement of product from the wholesaler distributor to the retailer is a very significant figure in terms of the sensitivity of what's happening in the market place, and that would be the figure in a distribution type of business I would look at.

Q Would bulk sales be some indication of movement?

A Movement of what?

Q Of bourbon and --

MR. SILVERMAN: Would bulk sales of what be an indication of --

Q Depletions were an indication of movement, if I heard you correctly, is that correct?

A I think it is an indication of demand for the product in the market place more than case sales from the company to its distributors.

Q But the company's dollar accounting is based on cash sales, not depletions, is that correct?

A That's correct.

Q And my other question is --

A But that wasn't what this exhibit refers to.

Q I understand that. Did you, before March 25, 1971, see an exhibit, Plaintiffs' Exhibit 44 that has been admitted in evidence, which shows total case sales and bulk sales reduced to a case sale equivalent?

MR. SILVERMAN: Your Honor, I'm sorry to rise again.

THE COURT: I don't know where this is going to get us.

MR. ODELL: Your Honor, I'll tell you where this is going to get us. These figures show a tremendous increase in case sales beginning in 1968, contrary to all this talk about the depletions that are mentioned in this affidavit.

THE WITNESS: Your Honor, if I may, my affidavit speaks of a growth in Schenley between 1968 and 1970, but I was really concerned with the period of 1966 to 1970, in addition to which I do indicate that a substantial amount of growth did appear and a good part of it really

1 jgh Shuman-direct 691

2 came from Dewars, and I really was discussing that in

3 relationship to the price/earnings ratio of Schenley because

4 Dewars was only a license arrangement that they had.

b5 5 MR. SILVERMAN: Your Honor, my objection is really

6 in a very real sense a broader one. It is one that I've

7 tried to articulate through the course of the trial.

8 This is not a fairness case. I am concerned

9 that my friend, despite your Honor's ruling, keeps putting

10 evidence into this record the only relevance of which is

11 the fairness of the merger terms, and he attempts to

12 bring it into the proxy case by the statement that in some

13 way Mr. Shuman was a bad fellow in that he gave an opinion

14 which he knew to be false; that makes it a disclosure case.

15 Thus far there isn't a single word in the record,

16 and I predict, your Honor, and I'm sorry that I must do this,

17 he is putting this evidence in through Mr. Shuman. I don't

18 care; he can go on forever. But I know what the next step is.

19 Mr. Dormer is going to be called as an expert,

20 and Mr. Dorm is going to come in and say: Well, now, let's

21 talk about the fairness of this merger. I am going to

22 dispute Mr. Shuman on the fairness of the merger.

23 And I suspect that my friend, despite your Honor's

24 ruling, is seeking to expand this case into a fairness case,

25 which it is not, and I therefore suggest that unless there

is some evidence with respect to Mr. Shuman's bad faith, evil intention, conspiracy, phonyness of figures, falsity of figures, not error -- for example, this talk now about sales versus depletions. I mean, am I now going to have to cross-examine to show that the sales also include Canadian or wines?

THE COURT: I am frank to say, if the figures are in the record, I don't see how the examination of this gentleman is going to further your cause, and it takes, it seems to me, an inordinate amount of time for modest profit even at best.

MR. ODELL: Your Honor, let me say, the figures are in the record, and I was merely trying to give this witness a chance to explain what seems to me to be a difference between the figures he was using and the figures that we've been given by Schenley and that have been admitted in evidence in this case.

Secondly, to answer Mr. Silverman once more, and I hope for the last time, I don't think I have to show that Mr. Shuman is a liar, that he acted with the most fraudulent intent possible, or anything like that. I think all I have to show is that his opinions were based on facts that were not so and, to the extent that some of those facts were given to him by the Schenley people, that that's sufficient

to show that the opinion --

THE COURT: I had thought that that was what we we were down to at this point, the sourco--

MR. ODELL: I did so, too. But I am just answering. It is not necessary to entertain all this hyperbole in order to make all the points I am trying to make in the proxy case.

BY MR. ODELL:

Q Mr. Shuman, wouldyou look at Paragraph 48, page 27 in your affidavit.

Would you look at 47 which leads to 48, but I would like to confine myself to Paragraph 48.

A Yes.

Q In Paragraph 48, you speak of "Glen Alden's investment judgment in 1968 being predicated in large part on the conclusion that it could quickly reduce to cash what was sought to be a substantial amount of relatively unproductive assets while maintaining the fundamental earningg power of the company."

First tell me, what is the source of your information for that sentence?

A Primarily the Graham report, and -- primarily the Graham report.

Q The Greenberg report, is that at all a basis for that report?

A The Greenberg affidavit?

Q Yes.

A I believe that referred to the Graham report, but I don't have a recollection of that.

Q And were there any sources beside Graham and Greenberg that was the source of your information for that

A No, sir.

Q You go on to say, "This assumption would seem to have been reasonable after an examination of Schenley's net working capital compared to the rise of the industry which indicates the company's relatively heavy inventory and receivable position (See Exhibit 22)."

Would you look at Exhibit 22 and tell me who prepared that exhibit, which shows the gross sales, net sales of all the distilling companies there listed? I am sorry, 21 and 22, 21 is the one I am looking at, the 1970 figures.

MR. SILVERMAN: It is 22 that you just referred to in the affidavit.

MR. ODELL: You are quite correct, Mr. Silverman, but I was referring --

THE WITNESS: Which exhibit would you like me to look at, Mr. Odell?

Q Hold on just a second.

(Pause.)

Q Exhibit 22 shows the comparison of current assets of those companies there listed for the year 1968, is that correct?

A Yes, sir.

Q And doesn't 21 show essentially the same

figures for the year ended in 1970 for those respective companies?

A That's right.

Q I would like to ask you first, what the source of your information was about the gross sales and net sales of National Distrillers as shown there in the amount of a million -- $1,34,200,000.

A I am not sure what the source was. I assume it was the public information contained in National Distriller's reports.

Q And would that be a 10K or an annual report of National Distillers?

A Yes, sir, probably.

Q And similarly, the figure that you show there for net sales of $669,000,000 --

A That's right.

Q -- does that figure come from the same source?

A I would assume it does, Mr. Odell. I don't have the source listed here so I can't be sure of that.

Q Whatever the 10K's or the annual reports of those companies show you will accept?

A Whatever source I used was the source that I used.

THE COURT: What do you intend to prove with this

MR. ODELL: I will tell you what we are getting into, your Honor. The reports we have on National Distillers, which is a company that is engaged in more than a liquor business, that company, according to our information, had gross liquor sales in 1970 of $516 million, and had net sales -- and net sales means sales less excise taxes of $234 million, and that -- and the averages that are shown here, in the right-hand column, which compares inventory to gross sales, puts Schenley in a very bad light compared to the other companies, particularly in relation to National Distillers.

THE WITNESS: Your Honor, in my affidavit I suggest that there are companies that are not directly comparable but are major factors in the liquor industry and tell in my affidavit that there are major liquor distributors which are in other businesses.

MR. ODELL: Your Honor, I asked a question.

May I go on?

THE COURT: I am just concerned at spending a lot of time reading to this witness the title of an exhibit that is in evidence, and then getting from him the source of it when apparently -- I am not clear as to why it is necessary to get the source.

Do you claim that an exhibit is prepared in a w

to make it misleading?

MR. ODELL: Well, I think this exhibit is misleading and puts Schenley in an unfavorable light compared to one of its large competitors. And it is going to be compared to -- well, it is being compared to its small as well as large competitors here.

Your Honor, I am practically finished with the exception of one or two more questions on this whole affidavit.

THE COURT: Go ahead.

MR. ODELL: All right.

Q I would like to ask you one last question, Mr. Shuman. The last sentence of Paragraph 48 reads, "Schenley comparative balance sheets for the period since Glen Alden's acquisition indicate some progress in this direction.

I am reading from the same Paragraph 48. "But not at all in the order of magnitude anticipated by Glen Alden (See Exhibit 24)."

Now Exhibit 24 attached to your affidavit compares Schenley on a consolidated basis for the year ended August 31, 1968, with the calendar year December 31, 1970, and I wanted to ask you wehther that comparison shows the full extent to which Schenley's progress in the direction of liquidating non-productive assets can be measured?

A Well, all this exhibit shows with respect to that, Mr. Odell, is that from the period that the so-called stewardship of Glen Alden began in December 1970, that the inventory reduction was $40 million and that the receivables increased by a million dollars. That is all that exhibit really shows.

Q Does tis exhibit show the progress, if any, made by Schenley in reducing its bulk inventories as distinguished from its inventories of other goods and materials?

A Well, it is not intended to show that. It is merely a summary of the financial statements of the companies as of those dates.

MR. ODELL: Your Honor, except for the one exhibit that Mr. -- or one piece of paper that Mr. Shuman is looking for, I have no more questions of him.

Q Do you have that piece of paper now, Mr. Shuman?

A I have a piece -- I am going to have to look at your question again, Mr. Odell, to make sure that this is a piece of paper that responds to your question. I have a piece of paper that is a summary of inventories for three years broken down by classification. I will have to get your question later and measure it against the piece of paper that I have.

THE COURT: You have your question in mind, don't you?

MR. ODELL: Yes. The question was -- I was looking for the piece of paper that he had that showed what per cent of Schenley's total inventory consisted of bourbons and blends, that 60 per cent figure.

That is the figure I am looking for.

Does that show it?

A It does not show the 60 per cent. It does give the inventory and I wouldhave to extrapolate it.

Q Does it show the dollar volume at which it can computed?

A Yes,sir.

Q What was the dollar volume at which the bourbonds --

THE COURT: Let's put the piece of paper in evidence.

MR. ODELL: I am perfectly willing to without seeing it.

MR. LEVIN: If your Honor please, I respectfully move to strike all of the testimony of Mr. Shuman. It was offered upon the promise and representation that it would be connected with some wrongdoing or mala fides on the part of the defendants, and the witness, and Allen

& Company, and Mr. Odell has not begun to approach the issue of proof on those subjects.

THE COURT: Well, I will await the completion of his case before I rule upon that motion.

MR.SILVERMAN: I don't know what it is supposed to show, Judge, but for whatever it is worth.

THE COURT: It may be received.

xxx (Plaintiffs' Exhibit 152 was received in evidence.)

MR. ODELL: Your Honor, I think this exhibit satisfies me that it answers at least the purpose to which I put my question, and as far as I am concerned, Mr. Shuman may not dig any further and produce any more exhibits.

THE COURT: Very good. Thank you.

A Well, I graduated Harvard College in 1956, and Harvard Law School in 1969, and Harvard Business School in 1971. I am a member of the Massachusetts bar. I have been in Allen & Company, Allen & Company Incorporated my entire career where I have been engaged full time in the investment banking business, with a particular emphasis on buying companies as a principal, and the analysis that one makes in doing that as a principal, as well as having given fairness opinions on several occasions, I have lectured at various business schools on corporate finance, and appeared on panels having to do with mergers and acquisitions and matters of that sort.

Q Sir, are the techniques that you have used in your evaluation of the fairness of the terms of this merger any different from the techniques that you have used in evaluating the fairness of other transactions for other clients?

A No,sir, they are not.

Q Nothing unusual about what you did here?

A Nothing.

THE COURT: When did you graduate from college and law school?

THE WITNESS: 1956 from college and 1959 from school.

THE COURT: When did you get the Masters degree?

THE WITNESS: 1961.

THE COURT: YOu said 1971.

THE WITNESS: I am sorry.

Q Mr. Shuman, have you seen Paragraph 9 on page 5 of Exhibit 1, that is, the merger proxy statement that we are concerned with in this case?

A Yes, sir.

Q And that is the paragraph that deals with Allen & Company?

A Yes, Allen & Company Incorporated, yes, sir.

Q And have you read that and read every word in it?

A Very carefully, sir.

Q Is there anything in that paragraph that is false, that is untrue in any respect?

A Not to my knowledge.

Q Do you affirm now the truth of the statements that are contained in it?

A As of that date, certainly.

Q Sir, in your opinion, was Schenley a better company with Buckingham's earnings in it than it was with Buckingham's earnings out of it and cash on the sale of Buckingham substituted therefor?

A Well, as I tried to make clear, I thought that

Schenley was a worse company with Buckingham sold and the cash in it than it was when it owned Buckingham.

Q Was it a factor in your evaluation of Schenley that after the merger cash would go from Schenley to Glen Alden?

A No, it made no difference whatsoever where the cash in Schenley went after the merger, because as I stated, I felt that Schenley was a poorer company after the sale of Buckingham than before.

Q And in your analysis of the fairness of the merger terms, were you looking at Schenley with the Buckingham cash in it and with Buckingham earnings no longer in Schenley?

A Yes, sir.

Q Now, there was some questioning during Mr. Odell's direct with respect to the announcement of the 1970 earnings which announcement, I believe it has been testified to, was made on February 25, 1971, the same day that the board of Schenley approved in principle, subject to the procuring of investment advice, the merger terms, the same day for both announcements; do you recall that?

A Yes, I do.

Q In your determination that the market price of Schenley stock was the best indication of fair value, did

you consider whether the '70 earnings, which were announced on February 25, '71, would have an effect upon the market price of Schenley stock?

A Yes, I did consider that.

Q Would you explain what effect you thought it would have, or if it would not have, what the reasoning was?

A Well, I did not feel the effect would be substantial or material in any way, and if anything, possibly negative, because Schenley issued quarterly reports and they were nine months out in the public market place which showed a year to year increase on a quarterly basis, and by subtraction you could determine that the last quarter after the 1970 earnings were announced really was flat with the comparable prior year's quarter, so that I would not anticipate that that would have any monumental effect on the marketplace, and if it did have an effect, and people were not anticipating that, it could be negative.

Q Let me see if I understand you.

The earnings for '70 were over the earnings for '69, is that correct?

A Yes, sir.

Q And you testified that the first three quarters of the '70 earnings had been publicly announced?

A Yes, sir.

Q And the increease from '69 over '70, how much of that increase is reflected in the first three quarters earnings that had been announced?

A '70 over '69.

Q If I didn't saythat, I meant it. Forgive me.

A All of it.

Q All of the increase?

A That's correct.

Q Was attributable to the first nine months?

A Yes,sir.

Q Now,I think that you said that the last quarter was level.

A That's right.

Q In fact it went down a little, didn't it?

A I think slightly.

Q And your analysis of the market impact of that did you think that the fact that there had beer a curve up for the first three-quarters and then a slight down would have a positive or a negative effect on the market price of Schenley's stock upon the announcement of the full year's earnings?

A It would be hard to determine. It certainly wouldn't be positive. It would be hard to determine whether or not it would be negative, but I was looking for

information as to whether or not the market values we were dealing with really were representative of what a free market would show, and I was satisfied that the impact would not be substantial in either direction.

Q One last question, Mr. Shuman. You testified as to the fees thatyou had negotiated with Mr.Becker for the work done in connection with the Glen Alden-Schenley merger.

A Yes,sir.

Q So that the record may be complete, have you received any additional sums by reason of the fact that you testified, or thatyou prepared affidavits in connection with the injunction actions that were pending in 1971 directed to this merger?

A No, I was responsible for defending my opinion.

Q So that the $200,000 that you received represent what you received in connection with this merger for all services rendered of any kind?

A Right.

MR. SILVERMAN: I have no further questions.

MR. ODELL: May we have a moment, sir?

THE COURT: Anybody at the back table want to ask any questions?

MR. SEASONWEIN: I have no questions, your Honor.

MR. MANNING: No, your Honor.

MR. LEVIN: No questions, your Honor.

THE COURT: Very good.

MR. ODELL: I have nothing further.

THE COURT: Thank you very much.

(Witness excused.)

MR. SILVERMAN: Your Honor, may we approach the bench for a moment?

THE COURT: Yes.

(Discussion off the record at the bench.)

THE COURT: We will recess until 10:00 in the morning.

(An adjournment was taken to October 29, 1975, at 10:00 A.M.)

MR. SILVERMAN: Not as an accountant. We have accepted that he is a Certified Public Accountant, your Honor, and your Honor will judge his testimony in the light of that qualification, I suppose.

THE COURT: Mr. Odell, given that concession, I don't think you need it.

MR. ODELL: All right. I just wanted to make sure the record was clear on that.

THE COURT: Very good.

MR. ODELL: Your Honor, at the close of Mr. Gardner's testimony you had previously admitted in evidence a two-page exhibit which was marked 148, and there was some question raised as to the second page of that exhibit by Mr. Silverman, concerning the state of his knowledge.

There were no objections raised, as far as I know, as to the first page of that exhibit, and I would like the first page of it offered in evidence.

MR. SILVERMAN: No objection to the first page.

THE COURT: Very good.

MR. ODELL: I offer Exhibit 148, which is a one page exhibit.

I may say, your Honor, with respect to the second page --

THE COURT: Why don't you just go ahead with that

MR. ODELL: Your Honor, may I withdraw this exhibit at this time. I don't want to take the time to check Mr. Chernow's testimony that is going to be offered in this case.

THE COURT: I have excluded it on the state of the record at this point. So let's just go forward.

MR. ODELL: All right.

Your Honor, in our letter, as well as in the answers to our interrogatories, we gave a number of the pages of Mr. Chernow's testimony that we were going to use in the course of this testimony. In the course of Mr. Chernow's testimony here I also made reference to the fact that I was cutting his testimony short by adding additional pages of his deposition in lieu of taking his time, and I notified the defendants of those pages, gave them the pages and line numbers of all, and I would like now to offer in evidence those pages of Mr. Chernow's testimony that are covered by my letter, as well as -- my two letters I should say, the letters that originally referred to the bulk of this testimony, and my later letter which covered the additional pages of Mr. Chernow's testimony, and I would like to have those identified as Plaintiffs' exhibit.

MR. SILVERMAN: Your Honor, I have told Mr.

Odell that rather than go and pick a sentence of one place and another sentence in another, I would be willing to have Mr. Chernow's entire testimony put in evidence before you.

MR. ODELL: I have no objection to that.

THE COURT: All right, then it may all go in.

xxx (Plaintiffs' Exhibit 153 was received in evidence.)

THE COURT: I take it you want it for use in inquiring of this witness at this time.

MR. ODELL: I will want some of it for use in inquiring of this witness at this time and I think for that purpose I can refer to specific pages which I have marked.

THE COURT: Why don't you go ahead.

BY MR. ODELL:

Q Mr.Gardner, in the course of your examination of the work papers of Haskins & Sells, did you come across work papers which showed that Schenley took a writedown on its empty barrels for the year ended 1971?

A Yes.

Q Now, did I ask you to make an analysis of the accounting treatment with respect to reflecting the book values of these empty barrels on the books of Schenley in order to form an opinion as to when a writedown on those

****

Schenley's is Mr. Chernow's testimony.

Q Do you have any knowledge as to whether Schenley discussed with anyone the writedown of light whisky until the end of 1971?

A I don't recall exactly what Mr. Chernow's testimony was on that. It so stated in his testimony when he said that it was discussed.

Q And you have no information other than that?

A No.

Q If I ask you the same question with respect to barrels, would your answer be the same, Mr. Gardner?

A With barrels, no, the answer would be different.

Q The answer would be different with respect to the used barrels?

A Yes.

Q And I take it you are referring to Haskins & Sells' early work papers.

A Yes. I think there is some additional testimony on used barrels also, Mr. Silverman. But I can't recall--

Q Is that Mr. Chernow's testimony?

A I believe it was. I can't exactly say that it came from this point at this stage. If you would let me read it, I would be happy to point it out to you.

Q Do you have any information other than that which

jgh 7 Gardner-cross
redirect

you got from the Chernow deposition?

A And the Haskins & Sells work papers.

Q So you have no independent knowledge other than Haskins & Sells and Chernow.

A I didn't discuss it with anybody in the company.

MR. SILVERMAN: No further questions.

MR. LEVIN: No questions, your Honor.

MR. MANNING: No questions, your Honor.

MR. SEASONWEIN: No questions.

THE COURT: Mr. Odell.

REDIRECT EXAMINATION

BY MR. ODELL:

Q I didn't quite understand an answer that you gave. Mr. Silverman asked you a question about the significant effect on Glen Alden of this writedown of the empty barrels, as I recall, and did you answer that question?

A I answered the question that as to dollars, for Schenley's purposes, there was no significant effect. But I said there was a significant effect.

Q In what respect was there a significant effect?

A I could explain the significant effect if I had the December 31, '71, Glen Alden 10K.

Q Let's get that.

A I need a few minutes -- I'm not prepared on this--

to look it over.

(Pause)

Mr. Odell, the significant effect was in the method of the handling of the extraordinary gain. It has to do with not only the inventory writedown but with the way the gain from Buckingham was treated on the records of Glen Alden, as reduction of the good will account.

For the purposes of Glen Alden's books or records as I can discern them from the 10K, Glen Alden in 1971 treated the net proceeds from the sale of Buckingham together with the -- less the taxes with all the other extraordinary gains as a reduction of good will and did not take in any account into their income statements.

In '70, unless they also wer to do it the same way and increase the good will, because a reduction in inventory would have been effectively an increase in good will at this point, which I don't think they would have done, I don't think it would have been proper, it would have had to go into the operating statements, into the earnings statements. That was the significant difference, from my looking at it.

Q Operating and earnings statements of Glen Alden as well as Schenley.

A As well as Schenley, definitely. The same effect--

the same net effect in the reduction of income to Glen Alden as Mr. Silverman pointed out for Schenley.

Q And to the extent the income of Schenley would have been reduced by taking this writedown in '70, so would the income of Glen Alden?

A On a consolidated basis.

Q On a consolidated basis, to the same extent;

A Yes.

MR. ODELL: Thank you.

RECROSS EXAMINATION

BY MR. SILVERMAN:

Q But there was no cash effect.

A I can't testify to that. I have no knowledge. I have opinions, but I wouldn't want to testify to my opinions.

MR. SILVERMAN: No further questions.

(Witness excused.)

MR. ZULACK: Our next witness is Mr. George T. Dormer.

G E O R G E T. D O R M E R, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ZULACK:

Q Mr. Dormer, what is your profession?

A I am an investment banker.

Q Approximately how long have you been an investment banker?

A Approximately 15 years or so.

Q What is your educational background?

A I received a Bachelor of Science at Massachusetts Institute of Technology, majoring in industrial management; received a Master of Business Administration in 1958 at the Harvard Graduate School of Business Administration, where I specialized in finance.

Q Could you tell us briefly what your experience has been in the investment banking field since your graduation from the Harvard Business School?

A The first preliminary experience of about a half dozen years or so I worked at two investment banking houses, Salomon Bros. and Hirsch & Company; two investment companies, the Franklin Corp. and the Equity Corp.; and during that period I was a financial adviser to a client.

For the last nine or ten years I was Vice President Corporate Finance at Dominick & Dominick and Bear Stearns & Company.

jgh 11 Dormer-direct

In this last two-year period I've been on my own, in my own firm.

Q What kind of things have you done as an investment banker?

A My experience has touched pretty much all aspects of the investment banking profession, which includes the raising of money both privately, private placements, publicly, through sale of securities, investments for our own account, tender offers, exchange offers, valuation of securities, general financial advisory services, mergers, acquisitions, dispositions, structuring of transactions, and so forth.

Q Now, in these types of transactions, how often do you have to make a financial analysis of the company or companies involved?

A I would way that in these types of transactions handled in the investment banking business they all require an examination into the financial condition of the company.

Q Are you familiar with the term "excess assets"?

MR. SILVERMAN: Objection, your Honor. I think I waited until my friend put Mr. Dormer's qualifications in the record.

I should again like your Honor to consider the answer to the expert interrogatories, and I most

respectfully submit that if the answer to the interrogatories is indeed viewed as an offer of proof, I think that your Honor will find that Mr. Dormer's testimony is wholly irrelevant to the issues in this case because they all go, as I am able to discern them, to the issue of the fairness of the terms of the merger.

I would hand your Honor the expert interrogatories and refer you to B(2), which is the substance of the opinion (handing).

MR. ZULACK: Your Honor, when you have an opportunity to read that, I would like to be heard on that matter.

(Pause)

THE COURT: Yes, sir.

MR. ZULACK: Your Honor, these answers to the interrogatories bear the date of October 15, 1974. The critical question here is, (1) is Mr. Dormer's testimony going to relate to valuation? It is not; and (2) are the defendants in any way going to be surprised by the testimony which he is going to give?

These interrogatories, when they were answered over a year ago, assumed that Mr. Dormer was going to testify on valuation and the existence of excess assets as they related to valuation. Approximately 11 months later

this trial was bifurcated.

There are two issues which are inextricably interwoven in this case, and we have geared Mr. Dormer's testimony only to address the preliminary issue, and that is:

(a) Are there excess assets engendered?

(b) How much are they? And

(c) Should they have been disclosed in the proxy statement?

The final question to be answered is: How do you value those excess assets once you find out that they exist, once you find out how much they are, and once you decide that it was not disclosed in the proxy statement? That would be answered in a subsequent part of this proceeding, your Honor.

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Furthermore, your Honor, when we are addressing ourselves to the principal issue of surprise, over five weeks ago, approximately, the schedule which Mr. Dormer was going to rely upon in discussing the existence and amount of surplus assets were given to the defendants. Also schedules relating to valuation were given to the defendants.

Mr. Dormer's testimony is only going to relate to those schedules which affect the existence and amount of surplus assets and their non-disclosure, and he is not

going to discuss the valuation.

In sum, I think there is no surprise here, and Mr. Silverman's objection is an extremely hypertechnical one at this point.

THE COURT: Go ahead on the limited basis you've outlined.

MR. SILVERMAN: So that the record is clear, if somebody should ever read it, my objection was not on the basis of surprise, it was on the basis of relevancy.

BY MR. ZULACK:

Q Mr. Dormer, what significance, if any, does the term "excess assets" have in the investment banking business

MR. SILVERMAN: I object to that. I don't see the foundation in this case.

THE COURT: At this point I will overrule that.

A Excess cash or excess assets are those assets that are excess to the viable operation of a business. They are extremely important in the investment banking business as they relate to a separate and distinct type of valuation when a company is examined.

It has a negative side to it. When you look at a financial condition of a company, you might find out that it doesn't have excess assets but that it has a deficiency of assets.

jgh 15 Dormer-direct

MR. SILVERMAN: Your Honor, I will move to strike every part of the answer except the words that excess cash is defined in the industry as being cash excess of what is necessary for the viable operations of the business. Everything else is not definitional and I believe he was asked for the definition.

MR. ZULACK: In the first place, your Honor, I don't believe Mr. Dormer finished his answer. In the second place I just don't understand the basis of Mr. Silverman's objection.

THE COURT: The objection is that the question had been answered and the witness is on a frolic of his own. I think at this point, it doesn't hurt you at all if I do strike the answer subsequent to that point and if there is other testimony you want to elicit in that area, go ahead.

MR.ZULACK: Fine.

Could you read back that part of the answer which is admitted, please. Could you read back the beginning part of the answer? I am not certain the record reflects --

THE COURT: Mr. Silverman outlined what it was, which was the definition of "excess assets" according to the testimony.

Q Mr. Dormer, are there any synonyms which are used in the investment banking field for the term excess assets?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Overruled.

A Excess cash, excess assets, redundant cash,

redundant assets, surplus cash or assets, sometimes cash rich loosely is used in that sense.

It certainly can be defined as assets not needed in the operation or cash not needed in the operation. I think that hits most of them that I have heard.

Q Mr. Dormer, I would like to ask you a few more preliminary questions before we get to your opinion.

A Sure.

Q One is, have you in your investment banking career worked on prospectuses and proxy statements?

A Yes, I have.

Q Approximately how many proxy statements and prospectuses have you been involved with in the preparation of these documents to be filed with the Securities and Exchange Commission?

A 30, 40, approximately.

Q What was your responsibility with respect to those statements?

MR. SILVERMAN: Is Mr. Dormer now an expert on proxy statements? I thought he was a financial analyst.

THE COURT: Let me take the answer and see what comes of it.

A I had the responsibility for the investment banking house for the documents filed for the SEC on certai

1 meb-3 Dormer-direct

2 particuplar transactions.

3 Q Now, another preliminary question. What under-

4 standing do you have with Mr. Odell with respect to your

5 compensation in this case?

6 A It is to be set by the Court.

7 Q Now, do you have an opinion whether or not

8 Schenley Industries have excess assets or cash equivalents --

9 A Excuse me.

10 Q Do you have an opinion, Mr. Dormer, whether

11 Schenley Industries had excess assets on or about -- betwee

12 May 31,1971 and June 17, 1971?

13 MR. SILVERMAN: I would object to that, your

14 Honor. Several bases: The one that I should particularly

15 call to your Honor's attention is that Mr. Dormer denied

16 "escess" synonymously as being "redundant, cash rich, sur-

17 plus."

18 Maybe those are synonyms and maybe they are not.

19 But I would like to know in which sense he used the word

20 "excess."

21 MR. ZULACK: Your Honor, I am first asking

22 Mr. Dormer whether he has an opinion. I am seondly going

23 to ask for the basis of his opinion and then I am going

24 to ask for his opinion.

25 THE COURT: At this point all you are going to

get from him is the answer "yes."

MR. ZULACK: Yes.

THE COURT: Now he has answered "yes." Now go ahead.

Q Mr. Dormer, what did you do in order to reach your opinion; what information did you consider?

A I looked at the financial condition of Schenley and the aspects surrounding the financial condition from a few vantage points to determine in my mind what was excess.

Q Did you look at the May 31, 1971 balance sheet?

MR. SILVERMAN: Your Honor, I will move to strike the prior answer as being non-responsive.

MR. ZULACK: Your Honor, if it will facilitate things I will re-ask the question.

THE COURT: All right, strike it out.

Q Mr. Dormer, what information did you consider, what did you look at, what exhibits or testimony did you consider in forming your opinion?

A I looked at the information available to the public, including the proxy statement, 10K's, I looked at -- I heard the testimony here, reviewed some of the testimony. I examined annual reports of comparable companies in the distilling industry, I looked at the -- let me see --

Q Did you look at Standard & Poor's for instance?

A I looked at Standard & Poor's, a letter from the Prudential, and similar documents.

Q Now, once you looked at these documents and heard this testimony, how did you go about forming your opinion?

A I examined --

MR. SILVERMAN: When?

MR. ZULACK: His opinion as to whether ornot Schenley had excess assets inthe period from -- on May 31, 1971.

MR. SILVERMAN: An "excess" I take it means what.

THE COURT: I think we better get that pinned down as a threshold matter. I am troubled by it.

Q Do you have an opinion as to -- what is your opinion as to whether or not Schenley had excess assets?

THE COURT: No, no.

Q What is the definition of "excess assets" in your mind?

THE COURT: No, what is the definition that you are going to use for the purpose of giving the opinion about which you are being asked.

Q Mr. Dormer, what is your definition of "excess assets" for the purpose of the opinion, defined for the

purpose of the opinion that you are going to give?

A Those assets not required in the viable operation of Schenley.

Q Now, did you come to a conclusion as to whether or not Schenley had assets which were not to be used in the viable operation of its business?

A I did come to an opinion.

Q And what was your conclusion, how much did Schenley have?

A My conclusion was that it had approximately $140 million.

Q What did you do to come to that determination?

A I examined Schenley's financial condition, and viewing it from three vantage points, I determined that 140 million was excess.

Q Did you prepare some schedules?

A Yes, I did.

Q I would like --

MR. SILVERMAN: Your Honor, I have not heard that he did, except that he viewed something from three vantage points.

MR. ZULACK: Your Honor, I am going to mark a schedule for identification. I am going to have Mr. Dormer go through the schedules.

THE COURT: Go ahead.

MR. ZULACK: Would you kindly mark this as Plaintiffs' Exhibit 154 for identification and I will show it to your Honor.

xxx (Plaintiffs' Exhibit 154 was marked for identification.)

Q Now, referring to Plaintiffs' Exhibit 154 marked for identification, would you tell us what you did in the preparation of this schedule?

MR. SILVERMAN: If your Honor please, may I voice an objection on the grounds of relevance. The definition that the witness is using is assets not required in the viable operation of Schenley.

Now, the relevance of other companies to that determination is, I suggest, so remote as to be non-admissible.

THE COURT: I think I am going to overrule that objection as of this state of the record.

Q Mr. Dormer, how did you choose the seven companies listed on Schedule A, which is 154 for identification?

A Those companies were contained in the current liquor analysis of Standard & Poor's under the subcategory, "Distilling Companies."

Q Are you referring to Plaintiffs' Exhibit 107 for

identification?

A Yes.

Q And why did you use Standard & Poor's industry survey in choosing these seven companies?

A Because it is arecognized statistical survey used throughout the investment banking business. I think that it would be unusual for any investment banking house of substance not to have the Standard & Poor's in their library.

Q Now tell me, Mr. Dormer, did this survey relate to a particular category of companies?

A Yes. This was the liquor category, which included brewers and distillers.

Q And these seven companies are in which of those two categories?

A In the distillers.

Q Why was it necessary for you to make a comparison of Schenley with these other distillers in order to reach your opinion?

A It is a common analytical tool to compare the balance sheets of companies within an industry to come to conclusions in terms of excess assets or a deficiency of assets, level of working capital, and so forth

Q Well, why is it a common practice to do that,

what is the reason behind comparing one company with another in the industry?

A Well, because if you compare the company with companies in another industry, there may be certain uniquenesses within an industry that make the comparison less valid than if you compare it within an industry that has many of the same perhaps seasonal factors and operating things that happen within an industry that are not applicable to other industries.

Q I see. Now, are all the companies which are listed in this survey comparable to Schenley?

MR. SILVERMAN: If your Honor please --

THE COURT: Yes, sustained.

MR. ZULACK: On what basis, your Honor?

THE COURT: The word "comparable" covers a lot and tells me nothing. It is a conclusory word.

Q Are there differences among the companies which are listed on the Standard & Poor's industry survey?

A Yes, there are differences between the companies.

Q And despite those differences, why did you decide to compare them for these purposes?

A Well, certainly in my opinion they were the most comparable of companies available for analysis.

MR. SILVERMAN: Your Honor, I suggest that this

is, in fairness --

THE COURT: Let me ask a question that is troubling me here, and is troubling me throughout this case.

Obviously, if you have a division, Buckingham, and you are going along and you are operating your total operation, which is Schenley, including its division, and you sell the division, you are going to end up with cash.

MR. SILVERMAN: One might think so.

THE COURT: That is what we are talking about, and I don't think anybody here would -- we can practically take judicial notice that you now have cash where you had a company. Why are we getting into all of this question of definition, what you do with it, what you don't do with it? Why is the gentleman here as an expert to say that this is "excess" when everybody agrees that you had an asset and now you have money for it? Would anybody argue that that is so? Nobody argues that that is so.

MR. SILVERMAN: Judge, we have it all over the proxy statement.

THE COURT: That is right. I have been at a loss since this case has begun as to why we have to define this as "excess" assets.

MR. ZULACK: Your Honor, we had to define it,

first, because it is material to how an investor, reading this proxy statement, judges what he is going to do with the decision offered him, whether ot accept the merger, whether to seek an appraisal or seek an enjoinment.

THE COURT: He knows they got $120 million for Buckingham. How cares what you call it?

MR. ZULACK: In the first place, your Honor, if a company gets $120 million, that does not necessarily mean that it is excess. For instance, Rapid-American is selling Playtex, according to Business Week of this week. It is getting $210 million from that sale, but if it is paying off bank loans because it is necessary for the continuing operation -- I am not certifying this -- but my understanding from reading the newspaper -- it is necessary for its continuing operations to use that to continue the viability of that company. A reader of a proxy statement seeing that this company had 120 or 95 or 60 million, does not know whether or not this is the type of money which is going to be used in the continuing operations, whether it is going to pay off bank loans, what it is going to do.

THE COURT: I know, but you can look in the balance sheet and see what the loan obligations are and see whether there is a need for it, and not only that, but they tell you, we are going to send a substantial part

of it upstairs. Right? Am I right about this?

MR. ZULACK: Your Honor, you are right to an extent and we think the extent, which is left over, is an extremely material part of the case.

Yes, the amount, the existence is very important. There is no way of telling from this proxy statement as to how much is surplus, and it makes a quantitative difference if it is 47 million or 20 million or 140 million. And why does it make a difference? Because the defendants maintain that the way that this stock was valued was based on the market price of the stock.

Now, there is a question as to whether or not an investor knew whether the market prices reflected this enormous cash which was coming in.

Let me start from the beginning. Your Honor, if you read this proxy statement you have no way of knowing how the $29, or whatever it was, was set on your particular shares. If it is set on market price, one of the inquiries you have to make, and if there is surplus cash, does the market price reflect the surplus cash. If you are told, "We are just giving you what the market price is," then you can make a decision for yourself, am I going to accept this market price if I don't think it has the surplus reflected in it, or am I going to seek appraisal where I

might get an independent valuation of the surplus or I might get an independent valuation of earnings or get an independent valuation of the market price, and if you put them all together I am going to get substantially more money.

Now, Mr. Dormer is going to testify that it is extremely important for the investor in making his decision to know that this money (a) is surplus, (b) how much it is, and (c), that there is nothing in the proxy statement to indicate that there has been an independent valuation of that money, because it is common practice in the investment banking field to give an independent valuation to surplus. It should not be valued as part of the operating procedures, it should be valued independently and separately. And that is critical if you are reading this proxy statement and you want to get the best deal you can.

MR. SILVERMAN: Your Honor, I feel like Alice in Wonderland. I hear everything that Mr. Zulack says and I don't know what he said. If we are talking about "excess cash that Schenley had cash as reflected in every balance sheet that appears, and the precise dollar amount is there, that Schenley sold Buckingham is there, the source of that cash, thatSchenley was going to send 80-- or substantial amounts up, is there, that no other moneys went up

is there, that the price was set after an investment banker said that it was fair and equitable, and Mr. Shuman testified as to his analysis is there. What else should we have put in?

THE COURT: Do I understand that what you claim should have been there is a statement that this is excess cash?

MR. SULLIVAN: I am saying as to this issue two things should have been said. One is, Schenley has $191 million cash and marketable securities. Here we have 162. Of that $191 million of cash and marketable securities, $140 million is not necessary for the viable operation of this business, and that is surplus to Schenley needs. That I believe is sufficient information upon which an investor couldmake a reasonable investment decision, with one other factor. The fact that Mr. Silverman says $120 million came from Buckingham does not make it surplus, your Honor. It just does not make it surplus, and if you read the proxy statement carefully, the most that you can get from a sophisticated analysis I think is that $47 million was going to go upstream to Glen Alden.

THE COURT: This is an area in which you are very familiar and I am not, but is there any accounting requirement in any 10K or any reporting that a corporation has

to do to make a determination of what cash or marketable securities is surplus and make a statement of that every time?

MR. ZULACK: Your Honor, not that I know, but I do know what I believe to be --

THE COURT: I am not aware of that. And does management have to go and label that? Suppose they want to buy something else with it? Then it is no longer surplus.

MR.SILVERMAN: They may want to pay off debts of $160 million.

MR. ZULACK: Your Honor, they may want to do that. I think the evidence is very clear in this case that it was surplus because a great deal of it was paid out. I mean, it is not the situation where you are going to pay bank loans, it is not the situation -- and it really has to be disclosed.

Now, the question is, is there an accounting bulletin which requires this? No, there is not to the best of my knowledge. But as a securities attorney, I think the standard is, would a reasonable investor, who doesn't know whether a company in this business needs 162 or $191 million, would he say, "Gee, they have got $140 million that they don't need in their business. That

really something special." As opposed to if it were GM which has $140 million or $150 or $200 billion, whatever it has, it is not comparable, he has no way of telling whethe this is the type of cash that a company in this business --

THE COURT: You are pumping for a rule in which they would have to say that or it is a violation of 10B? Is there a case in point?

MR. ZULACK: The case of Feit vs. Leaso.

May I make one statement before I get into that. What we are doing, what Mr.Silverman and I are doin we are giving you our legal arguments. I feel those arguments would be better presented with cases and authorities in a brief.

We have one last witness, Mr. Dormer. Mr. Dormer, I have tried in as good faith as I can, your Honor, to limit Mr. Dormer's testimony to one area, the existence, how he found out there was $140 million in surplus cash and marketable securities and what method he went through to find it. It is going to take me about 30 minutes to get that testimony in.

I think it would aid your understanding of the case. I think it would obviously satisfy me because it is going to complete our case. And I can't see how it is going to harm the defendants since we aren't prejudicing

anyone, and I think it is an important allegation, it is important proof, it is probative of our central point, and I really think we ought to have an opportunity to have it heard.

THE COURT: Why don't you spend the next few minutes here developing this. It may be that I may entertain a motion to strike it when it is in, but rather than talking here, just keep on putting it in and let me give consideration to the whole picture as you go along.

MR. ZULACK: Thank you, your Honor.

Q Mr. Dormer, on Schedule A, would you describe for us why --

THE COURT: I keep coming back to -- I look at this again -- I don't see why you need all of this. I don't think anybody argues with you that they have a big fund of cash here, 140, 120, what difference does it make?

MR. ZULACK: Your Honor, it makes a difference for two points and perhaps I have said this so many times it makes sense to me and it doesn't make sense to you. It makes very much sense to me that when you are talking about cash, it must be put in a relative sense. $140 million to GM is nothing. $140 million to Schenley is an extremely important figure, because it means you have got cash which is not necessary in the business. That is the --

THE COURT: I amn ot familiar with what the debt position was here, but are you going --

MR. SILVERMAN: It is in the proxy statemert.

THE COURT: -- but are you going to go underneath all of this that it is an erroneous business judgment that they sent it upstairs rather than paying off debt or that they should have paid off a debt?

MR.ZULACK: Your Honor, I am simply saying that a shareholder who receives this proxy statement ought to know three things. He ought to know (1) what an insider would know. This money is not the kind of money we need in the operation of our business, we have no intention to use it in the operation of our business. And (1), that was said partially in the sense that part of it was being sent up. That should have been identified for a relatively reasonable investor, I don't know about unsophisicated or sophisticated, but a reaonable guy in the street ought to know that because it is very important. It was important to Mr. Riklis when he bought the ocmpany, it was important in the Greenberg affidavit, it was important in the Graham affidavit. I think it should be important to a poor -- to a guy who is reading this prospectus, this proxy statement.

So there is an adjective which I would like to

see, your Honor. And secondly, that is qulitatively, but quantum makes an enormous difference. If you are talking $47 million that is $4.70 a share if you are going to adopt Mr. Dormer's evaluation, which I believe is acceptable. If you are talking about $140 million, that is $14 a share. It makes an enormous difference.

THE COURT: I will cease and desist here and I will hear this proof and I will give further consideration to it later one.

Q Mr. Dormer,on Schedule A would you explain that to us?

A Well, if I may, can I go back to giving you the companies that I used?

Q Yes.

A And in each case, it is the fiscal year just prior to the merger. The American Distilling Company, 9/30/70; Brown-Forman Distillers Corporation, 4/30/71; Distillers Corporation-Seagrams Limited, 7/31/70; Glenmore Distilleries Company, 6/30/70; Hublein, 6/30/70; National Distillers & Chemical Corporation, 12/31/70; Hiram Walker-Gooderham & Worts, Ltd., 8/31/70.

My Schedule A is Schenley's cash and equivalents at May 31, 1971, compared to other distilling companies. Those seven companies that I have just enumerated.

Initially I took the cash and equivalents, which is the first column on the left, and as you can see, Schenley's $191 million is $130 million greater in the aggregate than any of the other companies, those companies, some of which had even very greater sales than Schenley.

The third column is cash as a per cent of sales. I think it clearly shows that Schenley's with 31 per cent is significantly higher than the others.

The next one in line is 5.6 and they seem to hover around the 2-1/2 per cent.

The next column to look at is cash as a per cent of capitalization, and there Schenley is 39 per cent, which is considerably higher than the next highest at 10, and they seem to bunch around 5 per cent.

Next, cash as a per cent of current liabilities Schenley is 113 per cent, the next highest is 48 per cent, and they seem to group around the 15 per cent level.

The last column is cash as a per cent of liabilities and equity. Schenley is at 28 per cent, the next highest is 7 per cent, and they all group around 3 per cent.

This exhibit showed me that there was a large portion of the 191 million probably was excess to the operation. That was the first vantage point that I used.

MR. ZULACK: Your Honor, I offer Exhibit 154

in evidence simplyto show the basis of Mr. Dormer's opinion.

MR. SILVERMAN: Your Honor, may I ask Mr. Dormer some questions?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. SILVERMAN:

Q Mr. Dormer, this is a document that reads as of May 31, 1971, is that correct?

A No.

Q Schenley's statement is as of May 31, 1971?

A Yes, that is correct. Yes, sir.

Q When did the proxy statement go out, do you know?

A The proxy statement went out prior to June 17.

Q There is no May 31st balance sheet in our proxy statement, is there?

A No, I don't believe there is.

Q And we are dealing with the disclosure problem in a proxy statement. You got this $191 million figure from a May 31st balance sheet, isn't that correct?

A Yes, sir.

Q Do you know how long after May 31st that balance sheet was prepared?

A No, sir.

Q It wasn't done on May 2, was it, or May -- or June 1, was it?

A I don't know, sir.

Q Do you ever know a balance sheet as of May 31 to have been prepared on June 1 for any company?

o Yes.

Q It takes a little time, doesn't it?

A Yes, I do.

Q The figures that you have talked about, the cash as a function of various other things, that is --for example, cash as a percentage of sales?

A Yes.

Q Cash as a percentage of capitalization, cash as a percentage of something else?

A Yes.

Q All of that depends upon the quantum of cash, doesn't it, and if you have a lot of cash, which suddenly comes into your company, you would expect that there would be an increase, wouldn't you?

A An increase? From what?

Q By the way, would this figure of 191--would your conclusion have been different if that were 162.

A Excuse me?

Q Would you conclusion be different if that figure were 162 instead of 191?

A Perhaps.

THE COURT: It would, wouldn't it?

Q Would it or wouldn't it?

THE COURT: There is no question about it, is there?

THE WITNESS: This was just one vantage point of three that I used.

THE COURT: From this vantage point.

Q Would 162 --

A Yes --

THE COURT: It would change it all the way across the line.

Q And would that lead you to a different opinion with respect to whether the company had excess cash?

A Not whether it had excess cash, but the amount.

Q What about "whether," would you say the company had excess cash if that figure were 162 instead of 191?

A I would probably have said that there was excess cash, yes, if that had been 162.

Q Now, all the information you have gotten here is from public records, that is the basic information for these various companies?

A Yes, sir.

Q Do you know whether these companies had the same operations that Schenley had?

A They were all in the distilling business. If you note my note, three of them had substantial non-distilling assets in operation.

Q And therefore their cash ratios might be different perforce by virtue of the nature of their business?

A Some may have varied, yes.

MR. SILVERMAN: Your Honor, I will object to this, to the document, on the grounds that it is irrelevant to the issue that is before you, and that is, the question of disclosure in a proxy statement.

THE COURT: As of this moment, I will reserve decision on its admissibility.

MR. ZULACK: I am hading Exhibit 155 to Mr. Dorme to be marked for identification.

xxx (Plaintiffs' Exhibit 155 was marked for identification.)

BY MR. ZULACK:

Q Mr. Dormer, what other vantage points did you use in reaching your opinion?

A The second one that I used was to take the May 31, 1971 balance sheet of Schenley and extract from it

$140 million of excess assets, and also making one or two other minor changes, and try to determine from the resultant company, the resultant operating company, whether it was a viable company in my opinion.

Q And what were those other tests that you applied?

A Well, the tests that I applied were many of the common and analytical tools used in my field, such as working capital to sales, or cash to sales, inventory turnover, interest coverage, etc.

Q Now, Mr. Dormer, I am turning to page --the second page of Schedule B of Exhibit 155 for identification, and ask you how you went about extracting the $140 million.

A Well, as you can see, in the first column I have the May 31 balance sheet; in the second column I am taking the marketable securities and Glen Alden debentures, and taking them out of the balance sheet, which is approximately a $140 million reduction, and taking cash in CD's down by about $27 million, reducing current debt by $27 million.

The third column is an inventory writedown to reflect as reasonable an inventory level as I could.

Q That third column does not figure in the 140 figure or the 167 figure in the second column, does it?

A No, it does not. It reduces the net worth and

the inventory as well as reducing the liability about half the amount.

Q Now, what didyou do after you had extracted this $140 million from Schenley?

A I paid attention to the last column on the right which was the pro forma balance sheet, and what I did was, if I may draw your attention to my Exhibit B3, which is cash as a per cent of sales, I wanted to test the --

Q B3 is what?

A Cash as a per cent of sales.

Q Three pages after the pro forma which you were talking about? I have that now. Cash as per cent of sales, that is labeled Schedule B3, in Exhibit 155 for identification.

Go ahead, Mr. Dormer.

A I wanted to test my $25 million. Consequently I found that the Schenley pro forma ratio of cash to sales was 4 per cent, where the average of the middle five companies was about two per cent.

Q When you say "pro forma" you mean after you have taken out the $140 million?

A That's right, after the $140 million was extracted.

Q Would you quickly summarize for us the other

tests you made as reflected in these schedules?

A Well, the -- I also looked, of course, at the historical level of cash in Schenley.

Q What schedule is that in Exhibit 155 for identification?

A No, this was just my having looked at the historical level of cash.

Q I see.

A Then the next -- well, my conclusion from the cash was that there was probably -- there may have been more cash that could have been extracted.

The next one was Schedule B-1 working capital, as a percentage of sales. There I determined that Schenley 46 per cent was higher than the industry and there may have beenmore working capital that could have been extracted.

The next was ratio of current assets to current liabilities, or current ratio it is sometimes known as, was 3 for Schenley's, which was higher than the industry, which indicated that there may have been more that could have been extracted; the next one was the age of the --

Q Please identify these by number for the record, Mr. Dormer.

A Well, B1 was working capital as a per cent of sales, B2 was ratio of current assets to current liabilities

B4 is age of accounts receivable, and there at Schenley's 68 days appears a little longer than the industry which would indicate that there might be some accounts receivable that could ha ve been collected a little faster and more asse cash assets, developed.

The next schedule -- my Schedule B5 is inventory turnover. Shcnley's 1.8 is slower than the industry average, which again gave you an indication that there might be more inventory that could be extracted.

The next one that I would like to draw your attention to is B8, long term debt as a per cent of tangibl net worth, and there it is 27 per cent for Schenley, which is less than the industry average, indicating that there may have been more room on the balance sheet for long term debt than the resultant 71.5 million that was indicate on my pro forma balance sheet.

Q Now, these are all tests, comparable tests, between Schenley's pro forma balance sheet and other balanc sheets of other companies?

A Yes, sir.

Q Did you make any tests with respect to the relationship between balance sheets and income statements?

A Yes, I did. There are two of them shown . One is in Schedule B6, which is the interest covered figure.

Q Did you make any assumptions as to what Schenley's pro forma income was?

MR.SILVERMAN: Your Honor, I msut again rise to object and ask that this testimony be stricken. It is wholly irrelevant to any issue in this case, i.e., was there adisclosure of the cash that was going up? Was there a disclosure that there was cash in Schenley? Were the balance sheets accurate in disclosing that cash?

THE COURT: I lean in your direction, Mr. Silverman. I am frank to say I really don't see where this testimony is helping us with these issues. But we will take a five-minute recess at this point.

MR. ZULACK: Your Honor, do you know we are going to four o'clock?

THE COURT: I know we are going to four o'clock. But we will take a five-minute recess.

(Recess.)

T4 MR. ZULACK: I asked Mr. Dormer just before the recess to turn his attention to B6 and B7 and I asked whether he had any assumptions about pro forma income.

Your Honor, I asked Mr. Dormer that question because the pro forma income statement, which is the subject of Mr. Dormer's evaluation testimony --

THE COURT: This is the Schedule B6?

MR. ZULACK: Yes. In order to make a computation from B6, Mr. Dormer had to make an assumption as to what Schenley's pro forma income is. That is central principally to evaluation, and therefore we are not going into how he arrived at the figure that he thought that Schenley's income would be, approximately $22,000,000 on a pro forma basis.

But, of course --

THE COURT: Which pro forma are you talking about? Are you talking about Schedule B?

THE WITNESS: B6.

MR. ZULACK: There is a Schedule C, which we are not offering. B6, your Honor.

THE WITNESS: The interest coverage.

THE COURT: When you refer there to SH pro forma--

THE WITNESS: Right.

THE COURT: -- what does that mean?

THE WITNESS: That is the Schenley pro forma

b2 figure for interest coverage.

THE COURT: But as if what?

THE WITNESS: In determining that I had to develop a net income figure, and that net income figure is approximately 22,000,000.

THE COURT: I must confess, I'm lost.

MR. ZULACK: Your Honor, maybe I can clarify it. I was approaching it in this way in order to strictly adhere to your ruling.

Mr. Dormer prepared a Schedule C, which we have given the defendants. We do not believe that the pro forma income statement in the proxy statement is a correct presentation.

THE COURT: All right.

MR. ZULACK: But substantially, on the question of evaluation, it would take a number of hours, or a substantial period of time, for Mr. Dormer to go into how he reached this figure of $22,000,000. And since it is really incidental to showing the amount of cash which was excessed, we thought it would be easier to state on the record that that is an assumption. It is available for cross-examination. If we get to valuation, I think we will put it in evidence at that time.

THE COURT: At this point I think that there is an objection.

MR. SILVERMAN: Yes, your Honor.

THE COURT: Which I sustain.

MR. ZULACK: All right.

Your Honor, at this time I offer Exhibit 155 for identification in evidence absent Schedule B6 and B7.

THE COURT: I will reserve decision.

Now, Mr. Silverman, do you have any specific objection that goes beyond the question of relevance?

MR. SILVERMAN: I have a fundamental question which perhaps --

THE COURT: Let me perhaps articulate it, and I have to do it because we are all running against the clock this afternoon.

MR. SILVERMAN: If your Honor please, I would prefer to be late and include the direct of Mr. Dormer even if that runs over. So let's not feel under that kind of time pressure.

THE COURT: My question is this, and I may be wrong. It seems to me that unless the plaintiffs here are prepared to say that there should have been a statement in the proxy statement that dollars so and so and so and so are excess cash or excess assets, unless you are contending

that that should have been in there in haec verba --

MR. ZULACK: We are, your Honor.

THE COURT: -- then there is no purpose for these schedules whatsoever.

MR. ZULACK: Your Honor, that is our central contention.

THE COURT: Now, in order to get to that point, do you not have to get into the operations of Schenley and the decisions that were confronting management and how they handled them, to determine whether that fact is so and then, having established that that fact is so, if you establish it, do you then not have to convince a court that as a matter of law the failure to make that statement has worked an injury to your client?

It seems to me that, unless you are prepared to go through both of those, this whole area of proof fails of any purpose whatsoever.

MR. ZULACK: Your Honor, as to your first point, that is our central contention.

THE COURT: Let me just finish so you understand where I am.

MR. ZULACK: Your Honor, I understand exactly where you are.

THE COURT: It seems to me that this proxy

jgh 5 Dormer-direct

statement contains a statement of how much cash is there, how much is coming in, how much has been gotten from Buckingham, what the debt structure of Schenley is, how much money is available, and makes a statement that a substantial amount

b3 is going to go upstairs.

Now, from that a reader, it seems to me, if he wanted to, could make a determination of how much cash is available to pay off debt if it is desired, how much cash is available for other purposes, what the demands are for that kind of money, if any, and then you get down into areas of business judgment, it seems to me, that are not necessarily ones that have to be revealed because otherwise you would be revealing every conjecture that Schenley was making as to what it could do with its money.

MR. ZULACK: Your Honor, may I address myself to your three points?

As to your first point, it is a central contention of our case that the amount of surplus cash and marketable securities should have been stated in haec verba. That is a central contention.

THE COURT: All right.

MR. ZULACK: Secondly, can we bring an operating person from Schenley here to say that our central contention should have been stated in the proxy statement? No, we

jgh 6 Dormer-direct

cannot because we are not privy to the inner workings of Schenley and they are not going to tell us. That is part of the adversary process.

But do we have inferences, your Honor --

THE COURT: You have the depositions.

MR. ZULACK: I cannot get a defendant in most cases to admit he is wrong. If we did, we would have no lawsuit. What I can do, your Honor, is offer proof from which I think reasonable inferences can be drawn.

THE COURT: Can't you ask a president or an executive vice president, "What did you have in mind to do with this money? What were your options?"?

MR. ZULACK: We did, your Honor, and Mr. Chernow said: "Well, we considered everything. All the alternatives were considered."

And yet, while all the alternatives were considered, there was only one thing that was being done, and that was to pay out approximately a hundred million dollars by Schenley to purchase the minority shares.

That is, we say, a very strong inference, a conclusive inference, that a hundred million dollars is surplus. Nowhere in the proxy statement does it say that a hundred million dollars is going to be paid out.

2. There was also another inference, which we think

1 jgh 7 Dormer-direct

2 is strong, and perhaps reasonable men can differ, and

3 you will make a decision on this, your Honor, but we

4 feel it is very strong, that a company can go to an insurance

5 company which is concerned about whether its loan is going

6 to be paid in 1979 and that insurance company will say,

7 "Sure, you can take $115,000,000 in cash out of this

8 company and pay the shareholders."

9 That is an extraordinary event, we believe, and

10 I think it is an indication that this money wasn't going

11 to be used, that there was no intention of its being used,

12 in the operations of the business and that it was considered

13 by management to be surplus.

14 We think those are very strong inferences, your

15 Honor.

16 We have also testimony of Mr. Riklis and Mr.

17 Chernow that, "Well, by our definition" --

18 THE COURT: That record is already made.

19 MR. ZULACK: Yes, hour Honor; right.

20 THE COURT: That record is already made.

21 MR. ZULACK: Right. We have testimony from Mr.

22 Riklis and Mr. Chernow that Mr. Riklis said, I believe

23 by our definition, which he did not accept, which I contend

24 is a question of law, but by our definition, there was

25 between $80,000,000 and $120,000,000 in surplus. Put a

jgh 8 Dormer-direct

shareholder wasn't told that.

b4 THE COURT: And that record is in.

MR. ZULACK: That record is made, your Honor. I was addressing myself, your Honor, to your second point.

As I understood your second point, it is: Why don't you bring an operating person here to admit this was surplus?

I think to some extent we have, by our definition, and I think the inferences from the record are very strong that, regardless of whether they say we were going to have all these alternatives, what they were going to do was pretty obvious, and they did it.

The third point is, your Honor, can I convince the court that the failure to disclose in haec verba that this was excess and, too, that we have inferences which can be drawn that this was surplus, states a cause of action.

Your Honor, I believe I can. I believe the law is on our side. I believe there is at least one outstanding precedent from Judge Weinstein in the Eastern District a few weeks ago where there was a hundred million dollars, approximately, in surplus which wasn't identified.

Yes, there are distinctions, but I believe I can convince you in a brief on the law that this is the sort of thing that a reasonable investor ought to know.

THE COURT: Haven't you made your record for purposes of your argument at this point?

MR. ZULACK: Your Honor, I've made my record, with the exception of Mr. Dormer. What does Mr. Dormer bring to the record? Mr. Dormer is bringing a financial analysis, and he can say, "I looked at other companies. I used these techniques which I do in the ordinary course of my business, and I see that there is approximately $140,000,000 in surplus."

Now, why is that important? Because we have some questions of whether it is $80,000,000 or $40,000,000 or $120,000,000, and I think it is critical, when we are talking about 47 and 140, there is almost a $93,000,000 difference, and $93,000,000 is an extraordinary amount of money, and there is an extraordinary difference in how a shareholder is going to make his decision.

If he sees there is $93,000,000 which isn't going to be used, he says, "Gentlemen, this can be all paid up by the parent. How come I don't get some of that? Isn't there some sort of valuation whereby I should get some of that surplus?"

Is it fair, if they aren't going to use the money in the operations, to value this as part of the operations? Or should we value the operating part of the

company, (a), and should we value the surplus part of the company by a different standard?

We believe the law is, we believe the practice is, that there are two different standards. If an investor knew that this was surplus and what the amount of surplus was, he would act differently.

THE COURT: Okay. I am going to reserve decision overnight on Exhibit 155.

MR. SILVERMAN: Your Honor, I would like to put on the record some objection to it so that you may have it when you do consider it.

THE COURT: Right.

MR. SILVERMAN: In the first place, as to my friend's speech to your Honor about $140,000,000 being excess, 16,000,000 is disclosed to have gone out to the shareholders, 81, 60, 15, that movement is the fact, and not one other penny went from Schenley to Glen Alden, and to this day has been used in the business of Schenley.

If my friend contends, as he seems to, that the word "excess" is a word that should be used to denominate whatever the figures are as reflected in the proxy statement that is a decision for your Honor to make upon the submission of legal arguments. We are willing to do battle with him on that.

To characterize dollars blank as excess is, it seems to me, silly. Is it disclosed how much went up? Is it disclosed how much went out to the shareholders? And is it disclosed how much stayed in the business? Are those disclosures made?

Unless Mr. Dormer is an operating man and is willing to testify as an operating man what one should do with moneys, because clearly nobody intended that this money should go to the stockholders -- they are not entitled to it; they have a share in a company; it is an operating company; it is not a liquidated company -- it would seem to me that every fact that my friend wants to rely on is in the record, and to give Mr. Dormer's testimony as to any of this any credence when he attempts to construct a hypothetical balance sheet, he hasn't offered a hypothetical income statement, the fact is that there are actual balance sheets that are in the record and whose accuracy has not been questioned.

Therefore I would move to exclude the hypothetical balance sheet, the pro forma that my friend has sought to put in in Exhibit B and all of its supporting schedules.

MR. ZULACK: May I just address one question, without argument?

THE COURT: ure.

MR. ZULACK: Where is there an accurate balance sheet in the proxy statement which reflects the sale of Buckingham?

MR. SILVERMAN: The balance sheet? If you look at page 3, you will see it.

MR. ZULACK: Can you state where--

MR. SILVERMAN: Don't argue with me. It is either

b5 in or not in, and you can argue what you want.

THE COURT: Do have any more questions?

MR. ZULACK: I have a number of questions. I believe I will be about 10 to 12 minutes, I would say.

THE COURT: All right. Go ahead.

BY MR. ZULACK:

Q Mr. Dormer, did you consider any other vantage point in determining the basis of your opinion, reaching your opinion?

A Yes. I considered a third vantage point.

Q And what was that?

A That was the moneys that actually went out of the operation and the corollary, the amount that was permitted by the insurance company over and above what went out, namely a hundred million dollars went out of the operation. And if you add to that about $15,000,000 of Glen Alden debentures which were not needed in the operation, you get

a total figure of $115,000,000, and the insurance company allowed a further $15,000,000 to go out, according to their letter.

So therefore, using that $130,000,000 and the other, Exhibit A and Exhibit B, I felt that the $140,000,000 was a reasonable figure.

MR. ZULACK: Pardon me.

(Pause)

Q Mr. Dormer, without getting into the specifics of the valuation, are there different standards for evaluating a company which has surplus or excess assets than there are for one which does not?

MR. SILVERMAN: Objection, your Honor. This is not an evaluation case.

THE COURT: How does that bear?

MR. ZULACK: Your Honor, it bears on the issue of materiality. The materiality, as we understand it, is what should an investor know in making an investment decision. Mr. Dormer has testified there was surplus.

What difference does it make if it is identified as surplus? In a proxy statement, if common standards of valuation are that surplus is evaluated differently, then, it seems to me, that is material to a shareholder --

THE COURT: Is he prepared to say that there is

jgh 14 Dormer-direct

a difference?

MR. ZULACK: Yes.

THE COURT: And what is the basis of his expertise to testify as to this?

BY MR. ZULACK:

Q What is the basis of your expertise to testify as to this?

A Well, it is common practice in my profession to read authorities --

THE COURT: No, Mr. Dormer.

THE WITNESS: I've done it myself.

THE COURT: When you go and study a company, you are looking to see what the business is and what they invested in the business and what their cash business is, is that right?

THE WITNESS: Right. Well, their financial condition.

THE COURT: And you say that you make a value judgment as to a company based in part upon its business and based in another part upon excess cash in the business?

THE WITNESS: Or deficiency of cash.

THE COURT: You do that, don't you, just based on a balance sheet itself?

THE WITNESS: Well, not just on a balance sheet itself but on the balance sheet as it relates to the income

statement and as the company relates to comparable companies in its industry.

THE COURT: What I'm trying to get at is, you don't do that because somebody has flagged you to the fact that there is "excess income"; you do that because you have determined from reading the statements that certainly cash is large in relation to the operation, right?

THE WITNESS: I do it for a purpose.

THE COURT: No. But isn't that the way you do it?

THE WITNESS: Perhaps I misunderstood the judge.

THE COURT: You are going to say that you would evaluate a company differently based upon a situation of excess cash than you would if it did not have excess cash

THE WITNESS: Yes. That portion that is excess would be valued differently.

THE COURT: Do you reach the determination as to what is excess by reading the balance sheet and the income statement and related papers?

THE WITNESS: Right.

THE COURT: And you make the determination of what is excess from such a reading; you are not told that by anybody, but you have made that determination?

THE WITNESS: In some instances management tells me. In others I determine it. It is a situational thing.

THE COURT: When you say in some instances management tells you, how do they tell you? Do they put in the thing "This is excess cash"?

THE WITNESS: Yes. When you are discussing a company, they will tell you that so and so much "is excess to the needs of our operation" or "We are making an acquisition, and in this acquisition the target company has so and so much excess to its operation."

THE COURT: In how many cases does that happen with you?

THE WITNESS: With me personally?

THE COURT: Yes.

THE WITNESS: Oh, I'd say two dozen.

THE COURT: What kind of a difference has it made in your assessment in these two dozen situations?

THE WITNESS: Well, in each of those cases, when there was a purpose to valuing the company, I valued the excess differently than I did the operating company. And to get the total value, I added the two pieces together.

THE COURT: Now, is there anything unusual about doing that?

THE WITNESS: Unusual about doing it? No.

THE COURT: And you could do that here, could you not?

THE WITNESS: That is the approach I used, yes, sir.

THE COURT: And you did do it here.

THE WITNESS: Yes. It is the approach I used. Greenberg did it. Graham did it.

THE COURT: Well, there is no barrier to your doing it from this proxy statement and the related material.

THE WITNESS: Oh, yes, there is, sir.

THE COURT: What is the barrier?

THE WITNESS: Well, the barrier is that when I read the proxy statement it looks to me, taking a studied view of the proxy statement, that $47,000,000 is the approximate excess assets in this situation, and it was only through anarduous comparative analysis that I was able to determine what in fact was a reasonable figure for excess assets.

THE COURT: The objection is overruled at this point.

MR. ZULACK: Your Honor, I think you asked the
b6 question that I was about to ask.

BY MR. ZULACK:

Q What sort of a process do you have to go through, from reading the proxy statement, to determine whether or not there is excess? Can you tell whether there is excess from the four corners of the proxy statement, and can you

tell the amount?

A It appeared as though $47,000,000.

Q How did you come to that conclusion?

A Well, I came to the conclusion from two vantage points. One was the little chart on page 3 showing current maturities of long term debt of Glen Alden or $77,000,000 and that 30 of that was to be paid off by the sale of RKO-Stanley Warner, leaving 47,000,000, which was one of the uses that appeared to me, reading it.

Further, the net amount received from the sale of Buckingham, the gross amount of which was about 120,000,000 after taxes and what have you, came to 95,000,000, and a substantial portion of that was to go. And, using 4 , was 47 a substantial portion of 95? Yes, it was. So therefore the two seemed to reinforce themselves as a figure of 47,000,000 being the excess assets.

MR. SILVERMAN: Your Honor, I'm sorry, but I must move to strike this..As I understood it, excess assets were assets not necessarily in the ongoing business.

THE WITNESS: That's right.

MR. SILVERMAN: As he defines it. Now he arrives at excess assets by talking about what is going to happen to a certain amount of cash going up, which is $47,000,000, and he compared that to $91,000,000.

jgh 19 Dormer-direct

THE COURT: This is his contention as to what he would deduce from the proxy statement. That is his contention.

MR. SILVERMAN: Is he now testifying as an expert on proxy statements or as a financial analyst who is supposed to --

THE COURT: He is now testifying as to what he as a financial analyst would have deduced from the proxy statement.

MR. SILVERMAN: Well, all right.

MR. ZULACK: I have two questions.

MR. SILVERMAN: I am at a loss.

Q First, did you read the Greenberg affidavit, which is Exhibit 6 in this case? And did you read the Graham report, which is Exhibit 5 in this case?

A Yes, sir.

Q Did they in their affidavits have a separate standard of valuation for Schenley's excess ass s?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. ZULACK: May I have the ground?

THE COURT: What difference does it make how they valued it? It is what this gentleman is valuing it at.

MR. ZULACK: There was a prior question of how come,

jgh 20 Dormer-direct

and there is a practice of having a different standard of valuation for surplus or excess assets. I contend there can be nothing more relevant --

THE COURT: He said there is, so I've gone beyond that at this point. For purposes of taking this testimony I am crediting his statement that there is.

MR. ZULACK: All right, your Honor. I have no further questions of Mr. Dormer.

THE COURT: Mr. Silverman, do you want to recess at this point?

MR. SILVERMAN: If your Honor please, I would, and I do not know whether there will be cross-examination of Mr. Dormer, but I would be grateful if he could appear tomorrow morning, should we elect to cross-examine him.

THE COURT: All right. 10:30.

MR. SILVERMAN: 10:30, your Honor.

THE COURT: 10:30 in the morning. We stand recessed.

MR. ODELL: Your Honor, once Mr. Silverman has finished with the examination of Mr. Dormer, I think that we stillhave some housekeeping chores here in terms of exhibits, as to which I don't think there are any objections, that ought to be admitted in evidence.

THE COURT: Mr. Silverman wants to get away tonight, so I am not going to take it up now.

(Adjourned to October 30, 1975, at 10:30 A.M.)

1 **********

2 DOROTHY L. COLE, et al.
v.
3 SCHENLEY INDUSTRIES, INC., et al.

4 October 30, 1975,
10:30 A.M.

5 (Trial resumed.)

6 ---

7 G E O R G E T. D O R M E R, resumed.

8 THE CLERK: Mr. Dormer, you remain sworn.

9 THE WITNESS: Yes.

10 CROSS-EXAMINATION

11 BY MR. SILVERMAN:

12 Q Mr. Dormer, I have a very few questions for you.

13 Do you have Exhibit 1, the proxy statement?

14 A Yes, sir.

15 Q May I ask you to turn to page F24.

16 A I have F24 in front of me.

17 Q That would be the asset side of the consolidated

18 balance sheet of Schenley and the subsidiary companies for

19 the years 1969 and 1970?

20 A Yes, sir.

21 Q Mr. Dormer, do you have any reason to doubt the

22 accuracy of the figure which appears under "Cash" for 1969

23 of $50,126,228?

24 A I have no reason to doubt the accuracy, no, sir.

25 Q Do you have any reason to doubt the accuracy of

the figure of $4,000,000 for certificates of deposit?

A No, sir.

Q Do you have any reason to doubt the figure of $12,356,824 for marketable securities?

A No, sir.

Q Do you have any reason to doubt the figure of $11,604,779 under "Investments," which reflects the Glen Alden Corporation 6 percent debentures at cost?

A No, sir.

Q Do you have any reason to doubt the accuracy of the 1970 figures under "Cash" of $52,077,642?

A No, sir.

Q Certificates of deposit of $4,000,000?

A No, sir.

Q Marketable securities of $15,888,198?

A No, sir.

Q The Glen Alden debentures at $13,784,126?

A No, sir.

Q Now, sir, if you were to add those four figures for 1969, that is, the cash, the CD's, the marketable securities and the Glen Alden debentures at cost, would you accept that in 1969 you would come to a figure of about $78,000,000?

A I will accept your figure.

Q Would you accept that, if you added those four items under the 1970 column, you would come to a figure of $85.5 million?

A I would accept your figure, Mr. Silverman.

Q Now, since these figures, the last of them, speak as of December 31, 1970, do you know that the Guild Wine business was sold for about $14,000,000?

A I believe it is in the proxy somewhere.

Q Indeed, it is at page 44 of the proxy, isn't it?

A Let me look at 44.

Q Please do.

(Pause)

See the paragraph starting, "On February 26 1971. Schenley sold to Guild Wine Company..."?

A Right, its wine business, yes.

Q Did you understand my prior question to mean that Schenley sold its wine business to the Guild Wine Company?

A Yes, I did.

Q And that I misspoke when I characterized the sale as that of the Guild Wine Company?

A And, correctly on page 44, that was --

Q That does appear in the proxy.

A Yes.

Q Now, sir, since the 1970 figures that are reflected

on F24, did Schenley also sell Buckingham for $120,000,000?

A Yes, sir.

Q Is that fact disclosed in the proxy statement?

A Yes, I believe it is.

Q If there is any doubt, let's see where it is disclosed in the proxy statement. Look at page 1, the second paragraph, in block letters. Does that not refer to the sale of the Buckingham company?

A Yes, Mr. Silverman. There are other portions which give some of the use of proceeds.

Q Just answer my question, please. Is the sale of the Buckingham company referred to at page 1 of the proxy statement?

A Yes, sir, it is.

Q Would you turn to page 3 of the proxy statement. Under "Certain significant aspects of the proposed reorganization," paragraph 2, does that refer to the sale of Buckingham?

A Yes.

Q Would you turn to page 4, paragraph 7, toward the bottom of that page. Does that refer to the sale of Buckingham

A Yes, it does.

Q Would you turn to page 15. Does that page refer to the sale of Buckingham?

A Yes.

Q Turn to page 24. Does that refer to the sale of Buckingham?

A Yes, sir.

Q Turn to page 25. Does that refer to the sale of Buckingham?

A Yes, sir.

Q Turn to page 26. Does that refer to the sale of Buckingham?

A Yes, sir.

Q Would you turn to page 42, "History and business of Schenley, recent developments." Does that refer to the sale of Buckingham?

A Yes, sir.

Q And that runs from page 42 and 43 and 44, isn't that correct?

A Yes, sir.

Q Turn to page F16. Does that refer to the sale of Buckingham, the large paragraph beginning "On May 10, 1971. Schenley sold all of the stock of Buckingham..."?

A Wait a minute. F16, the paragraph starting--

Q "On May 10, 1971..."

A Yes. Yes, sir.

Q F32, does that refer to the sale of Buckingham?

A Yes, sir.

Q All right, sir. Now may I ask you to turn to page 43 of the proxy statement. See the pro forma?

A Yes, sir.

Q That pro forma shows that Schenley's earnings without Buckingham, that is, without the earnings from the sale of Buckingham's product --

A Yes.

Q -- was $22,543,000, is that right?

A Yes.

Q And, to be absolutely precise, that figure assumes that the proceeds of the sale of Buckingham had been used to produce about $4,000,000 of income, isn't that right?

A After tax income, yes.

Q That's what it says, right?

So that, if you were going to now exclude Buckingham completely, as though the proceeds from the sale of Buckingham had been put in a cold storage vault and it has no impact on anything, what were the earnings from Schenley's operations alone be, in accordance with that pro forma?

A In accordance with this pro forma?

Q Yes, sir. In other words, wouldn't you reduce the 22,543,000 by 4,000,000?

A Wouldn't I? No.

Q Sir?

A I or you, Mr. Silverman?

Q In accordance with this pro forma, there are $22,543,000 of income attributable to Schenley, right? Isn't that right?

A Yes. The --

Q The $4,000,000 figure is in that $22,000,000, isn't it?

A Yes. You are absolutely correct, Mr. Silverman.

Q And if you took Buckingham out of this picture completely, you would reduce the $22,000,000 by $4,000,000.

A On the way it is calculated here, yes, sir.

Q That's all that I'm asking you.

A I'm sorry. I misunderstood.

Q All right. So that would, at least pro forma, produce an income of about $18,000,000 for Schenley ex Buckingham, wouldn't it?

A Yes, sir.

Q Now let's go to the actuals, which are on that same page. Schenley, for the year ended December 31, 1970, had actual income of 27,183,000, isn't that right?

A Yes,sir.

b3 Q $27,183,000, right?

A Yes, sir.

Q And Buckingham for the year 1970 had earnings of $8,710,000.

A Correct.

Q If you reduce this $27,183,000 by the $8,710,000 of Buckingham's earnings, what do you get? Do you get the $18,000,000 figure?

A Well, let me do it for you, sir.

Q Please do.

(Pause.)

A I get $18,473,000.

Q $18,473,000, right?

A That's what I get.

Q That's actual. And the pro forma comes out to what?

A No, that's not actual. That is taking the Schenley less the Buckingham 1970.

Q That is precisely what I am asking you to do.

A And the pro forma comes out to 22,543,000.

Q Less the 4 million, which is attributable to Buckingham, right?

A Yes.

Q Will you do that arithmetic?

A That also should come out to the exact number I gave.

Q Not only should but does, isn't that right?

A Yes, sir.

Q Now, is there any doubt in your mind that that Schenley without Buckingham was a viable company?

A No, there is no doubt that Schenley without Buckingham was viable.

Q Now, sir, let me ask you a question and I would be grateful if you would listen carefully to it.

A All right.

Q If all of the cash, certificates of deposits, and marketable securities, and for the purpose of this question I will use those three items and refer to them as cash, because they are cash or its equivalent, right?

A Yes.

Q Will you go with me and use the word "cash" --

A Yes, certainly.

Q -- so I won't have to repeat it the three items.

A Absolutely.

Q If all of the cash which I have just defined--

A Right.

Q -- in Schenley, other than the amount which was used in connection with the reorganization, was in the best and honest and correct judgment of the management of Schenley required in the business of Schenley, would you in your expert opinion and under your definition of "excess" denominate such cash as excess?

Do you understand the question?

A I would like it repeated, if I may.

MR. SILVERMAN: Please read it back and read it back slowly.

(Record read.)

Mr. Silverman, if I may clarify one aspect of your question, I think that I can answer that I would not classify it as "excess," and that is, if the requirements are for operations of the business --

Q Do you make a distinction between operations and the possibility that it will be used to repay debt, is that a distinction you are making?

A Mr. Silverman --

Q I only use that as an example.

A Well, I had a couple of thoughts in mind --

Q I don't want to discuss it with you. I will put my question to you again.

A The answer to your last question about debt is if the use of debt is not -- if management in their own opinion and judgment feel that the debt level that will result is one that they will continue with, not just a temporary one of one or two or three or four months.

Q Did you hear my words of "honest" and "correct, and I will add another ingredient, "good faith"; if in the business judgment of management, the money or the cash, other than that which was used in the reorganization, was necessary in their judgment for the business of Schenl would you consider that "excess"?

A No, sir. Necessity.

MR. SILVERMAN: No further questions.

REDIRECT EXAMINATION

BY MR. ZULACK:

Q On the basis of your analysis did you feel that other than the money which Schenley used in the reorganization there were additional moneys which were exce to the operations of Schenley?

MR. SILVERMAN: I am sorry, your Honor, may I have a clarification? Does this imply that Mr.

Dormer now is an operations man in the liquor industry?

MR. ZULACK: No, I asked him his financial -- from the point of view of his financial analysis.

THE COURT: Let's have the question read back. We will see what the question is.

(Question read.)

Q Let me place an adjective in that sentence. I said from your analysis -- from your financial analysis did you believe there were excess -- there was excess cash in Schenley over and above the $98 million or the amount that was used in the reorganization?

MR. SILVERMAN: Your Honor, I have a problem with it because I don't understand the nature of the question.

THE COURT: Well, I think I know the nature of the question, but this gets me down to the troublesome problem that you gentlemen left me with at the end of yesterday which has been troubling me ever since, and that is the admissibility of the whole expert opinion and the schedules that go with it. This is an oral repetition of the schedules.

MR. ZULACK: It is, your Honor.

THE COURT: And particularly in the light of

this witness's answer to Mr. Silverman on that last question, I am very troubled by the admissibility of those schedules which are based upon a comparability, or a claimed comparability, of Schenley with other companies in the distilling business, and a mere statistical comparison to arrive at a figure that is excess, and it seems to me that given this answer to the very last question that we had, which crystallized I think some of the problems I have been having with those exhibits, would necessarily require that I not only exclude the exhibits, but sustain an objection to this last question on the grounds that there is no foundation for this man to give this testimony. It is not enough to look at figures and say, "This amount is excess because statistically it is more than other companies have."

I think that sums it up. And that is what you are asking him to do because there has been no -- and Mr. Dormer has not misled anybody but he has done no study whatsoever as to what management was thinking, what their needs were, what their options were, what their considerations were.

MR. ZULACK: Your Honor, I believe in understanding your ruling, in evaluating your ruling, I think we must first understand what the scope of relevancy is, and wh

the purpose of Mr. Dormer's testimony is in light of the entire case.

THE COURT: Well, let me tell you what I think it is and then you tell me if I am wrong.

Mr. Dormer is here to make a statement that $140 million is excess capital -- is excess cash -- and that it should have been so stated in the proxy statement.

MR. ZULACK: That is correct, your Honor.

THE COURT: That is the very tip of the iceberg. And he arrives at that by a comparison of Schenley with other distillers.

MR. ZULACK: He does, your Honor.

Your Honor, Mr. Dormer has a perspective. I believe his perspective as defined, his perspective as an investment banker, is of relevance to this case. Is there another perspective of an operating person? There might be, and there might be a perspective of another operating person, and the only opinions of operating people are perhaps people who are Schenley people but we cannot get -- from our point of view we cannot get operating people from Schenley to admit what we consider to be a wrongdoing.

THE COURT: No, it seems to me that you can make your case as strong as you can by a seizing to your bosom the fact that $91 million went upstairs. That fact is

established.

MR. ZULACK: I know, but --

THE COURT: That is not coming back, obviously. A certain amount of money went upstairs. That by its own definition was not being used in the operation of the business. And there it seems to me is your case, and that is proven, it is concrete, management has made that determination, it is "a substantial amount of money" -- I don't mean that in a determinative sense of this lawsuit -- but then the question comes down as to whether as a matter of law that had to be stated, whether "substantial" had to be denied, whether it had to be put in the proxy statement that in management's judgment this money was not needed in the operation of the business and was therefore excess.

It seems to me there is the case to the extent it is a legally viable case, but for this gentleman to say that $140 million is excess because I looked at some figures, I have been troubled with that ever since you dumped that problem in my lap yesterday.

MR. ZULACK: Your Honor, just a brief word, and I say I will be brief and I hope I will be brief. I try to distinguish your legal ruling on the merits from the relevancy of this evidence.

As I understand relevancy, does this testimony

have any tendency to prove the existence of a fact in consequence in this lawsuit? And I think that the drafters of the rules of evidence used those terms "any tendency" with the broadest possible -- I think it is Rule 401, your Honor. Does it have any tendency whatsoever? I believe it does have any tendency, and then the question is, is this particular person, under Rule 702 or 703, is this particular person, the type of person who has specialized knowledge which can be helpful to the trier of fact in any way to this Court.

I don't mean to say, your Honor, that Mr. Dormer's testimony is definitive. I don't mean to say that because he says you have $140 million in excess cash that that makes it excess cash. I am saying from his perspective, from his specialized knowledge as an investment banker, he can make financial analysis which I think has a tendency to support, let's say, a $115 million figure, which the Prudential permitted Schenley to pay out, which would support some of the statements which Mr. Chernow said, but clearly under the constraints of Mr. Odell's definition, I think this evidence is relevant.

In short, what you do with that evidence, once you admit it, is obviously something which would be a part of your final decision.

I am simply talking about the relevancy. I think this record should be as full as possible and I see no prejudice whatsoever to having a full record and having our decision made upon the basis of a full record.

THE COURT: Well, perhaps the way to resolve this problem is to admit these charts, but I don't want you to be under any misapprehension --

MR. ZULACK: I am under none whatsoever.

THE COURT: -- that I am terribly moved by them. I think it is perfectly clear from everything I have said so far that I don't feel that this is an area where expert testimony is of really great assistance.

MR. ZULACK: Your Honor, all I ask is that you take it for what it is worth and under the definitions under which it has been given, no more than that.

THE COURT: All right, I will accept them as I have stated.

MR. ZULACK: Thank you, your Honor.

THE COURT: Unless there is some objection other than has been heretofore raised.

MR. SILVERMAN: Our objection as to competency has been articulated; your Honor has taken it for whatever it is worth.

THE COURT: There was one part of it withdrawn

MR. ZULACK: B Schedule.

xxx (Plaintiff's Exhibits 154 and 155 were received in evidence, Schedule B excluded, 5 and 6.)

MR. ODELL: Your Honor, we have some of the undisputed facts which we believe are to be offered in evidence and received, and if I may be permitted to take them up one by one, unless Mr.Silverman is prepared to accept them all as relevant and material, subject certainly on our part to an understanding that that is not dispositive of any issue to which they are relevant, and in the course of your ruling, you will weigh the probity and the weight of these.

THE COURT: Let's take them up. You are maybe anticipating things that are not going to come to pass.

MR. SILVERMAN: If Mr. Odell will just give us the numbers then we will be able to redact.

MR. ODELL: Start on page 2 with undisputed fact Number 2. That fact deals with --

MR. SILVERMAN: Don't argue it. If we have an objection we will tell you.

THE COURT: All right, I see no objection to that. Number 2 is received.

MR. ODELL: Number 5.

MR.SILVERMAN: Mr. Becker's testimony is in

evidence and I see no places for number 5.

MR. ZULACK: No, Mr. Becker's testimony is not in-evidence.

MR. SILVERMAN: I beg your pardon. All right, we will take 5.

THE COURT: All right, 5 is received.

MR. ODELL: Number 6, I believe.

MR. SILVERMAN: Are you offering 6?

MR. ZULACK: Yes.

MR. SILVERMAN: Are you offering both paragraphs of 6 or just the first, because I thought we had testimony from Allen & Company here.

MR. ODELL: Your Honor, I just wanted to -- I want 6 for one very narrow purpose.

THE COURT: I don't know that Mr.Silverman is objecting even in his totality. He just wants to know what you are offering?

MR. ODELL: I am offering both paragraphs.

THE COURT: All right, any objection to both paragraphs?

MR. SILVERMAN: No.

THE COURT: Very good, received.

MR. ODELL: Paragraph 12.

MR. SILVERMAN: Your Honor, I have no objection

to the first sentence but I do not see the relevance of the "reorganization made no change in the business of Schenley nor did it result in Schenley's acquiring any new business or assets," but I will not object, I just do not think it is relevant to any issue here.

THE COURT: It will be received.

MR. ODELL: Paragraph 13, 14 and 15, in that order.

MR. SILVERMAN: 15, sir, I do object to.

MR. ODELL: You have no objection to 13 and 14?

MR. SILVERMAN: No, I have no objection to 13, and I have no objection to 14.

MR. ODELL: Mr.Graham's testimony was the subject of a deposition which was not offered in evidence by us or the other side.

THE COURT: Let me find out what the reason for the objection is.

Mr.Silverman?

MR. SILVERMAN: Mr. Graham was not called. Mr. Graham's testimony is not properly in this case. Your Honor does not want a repetition of the reasons that we objected to the whole Graham report, and your Honor admitted the Graham report only on the basis that Mr. Riklis had

seen it, and it was for that limited basis that that report is in evidence.

And there has been testimony from Mr. Riklis about that report, and to that extent there is material in the record.

To attempt to bring Mr.Graham's report and give it a greater degree of dignity than your Honor's ruling would accord it, I think is not proper. It is not part of this case. It is not fair to this case.

MR. ZULACK: Your Honor, we are not trying to --

THE COURT: Well, I don't think they are doing, frankly, any more than was done with Mr. Riklis. I don't think they are offering the Graham report for the underlying truth.

MR. ZULACK: Absolutely, your Honor. I was trying to abridge Mr. Riklis' testimony because exactly what his status was had been the subject of long discussions between our adversaries and ourselves and this set forth what were the undisputed facts.

THE COURT: I will receive 15 with the express understanding of Mr. Zulack that the report that is referred to is not being received for the truth of its contents but merely for the fact that it was prepared.

What is the next one?

MR. ODELL: 16, with reference again to the Graham testimony.

MR. SILVERMAN: That is what I expected the result of 15 might be, absentyour Honor's ruling, but 16 makes it clear they are now giving the Graham report a much greater dignity.

MR. ZULACK: We are not giving the contents of the report more dignity. It puts in perspective it was a vice-president or assistant to Mr. Riklis who was spending a substantial amount of time with a particular report. Mr. Graham was not subpoenaed because he is in San Francisco, I have learned, and I don't understand the scope of the subpoena.

He was deposed. And this is a statement of what he said in his deposition.

MR. SILVERMAN: Your Honor, if the only question is how long he worked that is an irrelevancy, and everything else is incorporated in 15.

THE COURT: Well, I tend to agree with you, but I am going to admit it anyway.

MR. SILVERMAN: I would rather your Honor didn't agree with me and exclude it, but I don't have that option.

MR. ODELL: 17, your Honor, is the next undisputed fact.

MR. SILVERMAN: Your Honor, I take it this refers to the Greenberg affidavit, and that is, I take it, in evidence, under the same ruling that you made with respect to the Graham affidavit.

What is the necessity for this?

MR. ZULACK: The necessity for it is that we showed the Greenberg affidavit was admitted rather than going into a half hour of bringing allthe papers in from the Supreme Court, we wanted to show the context in which it was prepared.

MR. SILVERMAN: All right, if that is the purpose.

THE COURT: All right, received.

18?

MR. ODELL: 18?

MR. SILVERMAN: No objection.

MR. ODELL: 19.

MR. SILVERMAN: No objection.

MR. ODELL: 20 and 22.

MR. SILVERMAN: We will consider 20 and 22 at the same time. And our objection to one aspect of each of those is the figure for 12/31/72, which is long after the merger that we are concerned with. Absent that figure, we have no objection in both of those paragraphs.

We have no objection to what we consider to be the relevant information.

THE COURT: Well, your objection to the'72 figure is relevance and Mr. Odell wants to argue that this shows that a plan that had been put into effect at some earlier point was in fact coming to fruition according to him, and that this is some evidence of that, what Schenley knew or should have known from some point during the relevant period.

So, I will admit 20 and 22.

MR. SILVERMAN: What happened to 21?

MR. ZULACK: We are not offering it. If you want it in we will put it in.

MR. SILVERMAN: No, no.

MR. ODELL: 23.

MR. SILVERMAN: No objection.

MR. ODELL: 25.

MR. SILVERMAN: Your Honor, I would have no objection to the offering of the agreement and it wil speak for itself.

MR. ODELL: Fine,very good.

May we offer it?

THE COURT: You may.

MR. ZULACK: Mr.Silverman, we had lumped the

agreement together with its amendments. There are three, 56, 57, 58.

MR. ODELL: We offer those three exhibits in evidence, your Honor.

xxx (Plaintiffs' Exhibits 56, 57 and 58 were received in evidence.)

MR. ODELL: The next one is 28, your Honor.

MR. SILVERMAN: Your Honor, since this is a partial statement of the facts, I have no objection to it as far as it goes, but I may offer evidence in our case with respect to it.

Very good, 28 received.

End 2

jgh 1

T3 MR. ODELL: 30.

MR. SILVERMAN: Your Honor, this I do not understand the relevance of at all, and I do object.

MR. ODELL: One of the claims we make is as to the defects in disclosure, and it is made at length in the pre-trial order as well as in the memorandum that we have given your Honor here, that the failure to disclose the market prices of the 6 percent debentures bore on the investment quality of the 7-1/2 percent debentures because there was a parity in value.

Mr. Shuman in his affidavit, Exhibit 49, says so. and Exhibits 1, 2, 3 and 4, that when he arrived at the value of his 7-1/2 percent debentures for the purpose of this merger he keyed it to the 6 percent debenture market price and the yield at which they were selling at the time.

MR. SILVERMAN: Your Honor, the relevance of this, it seems to me, can only be, and tangential at that, that what we offered to the Schenley minority in this exchange was not worth the 29. But that was a fact that was eschewed by my friends.

The only question is, as they saw it and as they have tried to prove it, despite the fact that -- I withdraw "despite the fact."

Your Honor having excluded that part of it as a

jgh 2

fairness case, the only issue then as they saw it was, was what the Schenley minority owned worth more than 29, not that what they were getting wasn't worth 29.

There hasn't been a word of evidence in this record on that subject, and the only relevance of the disclosure of the price of another Glen Alden security can only remotely bear on an issue which is not in this case.

MR. ODELL: Your Honor, the ground for my asking for 30 to be admitted has only to do with the question of disclosure. This proxy statement should have stated what the 6 percent debentures were selling at --

THE COURT: Why, Mr. Silverman says.

MR. ODELL: Why? The prices were some 40 percent off their face amount. That is the why. And an investor ought to know that the 7-1/2 percent debentures being offered in this merger, regardless of what their value might have been - there would be no way of knowing their value until the 7-1/2s were issued. There was no way of knowing what their value was in May, at the time this proxy statement came out.

He at least should have been told that the 6 percent debentures, which he was told would rank pari passu with these new 7-1/2 percent debentures, was selling at these discounts which were more than 40 percent off the face amount.

b2 Now, the test of whether something should be

jgh 3

disclosed or not is not whether in fact the value of the 7-1/2s was or was not disclosed. The question is whether the disclosure of this material might or would affect the investment judgment of the holders of this stock as to whether they wanted to accept a debenture that was to rank pari passu with these 6 percent debentures that was then selling at a 40 percent discount.

THE COURT: This is a fact of public knowledge, however, is it not?

MR. ODELL: Your Honor, it is a listed bond, and the fact that it is listed is no reason for not putting it in the proxy statement. The market prices of Schenley stock were listed too, but they are in this proxy statement.

Not only that, your Honor. I believe in my memorandum I make the point that under the rules of the SEC, and I think it is Rule 14(a) or (b)6, the market prices of the issuers of securities have to be listed.

MR. SILVERMAN: Oh, no. If your Honor please I had no idea that that was in the pre-trial memorandum. But it does not mean what my friend would seem to suggest that it means.

But we need not argue that as a matter at this point. The issue is, does this have relevance to anything other than the value of what we gave to the Schenley

1 jgh 4

2 shareholders?

3 It is not an issue in this case that what we gave

4 them, whether it was a 7-1/2 percent debenture or some

5 Chinese francs, at a value of 29. That issue, as to what

6 the value of the paper was, is not in this case.

7 The only conceivable relevance of the prices of

8 the 6-1/2 bond goes to the question of the value of what

9 they got, not the value of what they gave up, and there is

10 no evidence in this record with respect to the value of

11 what they got.

12 This will be the only evidence, and I suggest

13 that it is so remote, and indeed, because my friend has, I

14 think, taken it out of the case --

15 MR. ZULACK: No.

16 MR. SILVERMAN: Well, there has been not a word

17 of evidence on the subject.

18 MR. ZULACK: Because it was a subject of undisputed

19 facts. There was no reason to prove it.

20 MR. ODELL: This allegation is in our complaint,

21 it is in the pre-trial order, it is the reason for putting

22 it in as an undisputed fact, and apart from all of those

23 technical reasons I would like to take Mr. Silverman up

24 right where he left off.

25 What is there in this proxy statement that would

jgh 5

tell this investor anything about the value of these 7-1/2 percent debentures that he was going to get? What is there in this proxy statement that would tell him that?

MR.SILVERMAN: An opinion by Allen & Company that the terms were fair and reasonable.

THE COURT: Since we are only dealing with the question of relevance, I will take it.

MR. ODELL: 31.

MR. SILVERMAN: Same objection.

THE COURT: Aren't we getting a little bit off the ranch with this one? It seems to me that somewhere you have to draw a line.

Why should they put down whether an investment service rates bonds? On that theory, if the Wall Street Journal had written an adverse article three days earlier, theoretically they would have to put that in.

I will sustain the objection to 31.

MR. ODELL: 33.

MR. SILVERMAN: Objection. 32 or 33?

MR. ODELL: 33.

MR. SILVERMAN: Forgive me. I thought it was 32.

33 is already in evidence, your Honor. It is cumulative, certainly.

MR. ZULACK: Okay. It is in evidence.

jgh 6

THE COURT: Very good.

MR. ODELL: 34.

MR. SILVERMAN: I have no objection.

THE COURT: 35.

MR. SILVERMAN: Again, I'll object to 35 on the grounds of relevance. This goes to a 1972 proxy statement. That is the footnote that appears before --

THE COURT: What is the purpose of 35?

MR. ODELL: There are several purposes for 35, your Honor. First, 35 is a statement by Glen Alden's management that the value of its investment at Schenley had not declined and --

THE COURT: And this was the subject of some testimony by the accountant.

MR. ZULACK: The only purpose for this is that we maintain that this is a very important disclosure. A similar disclosure was in the 1971 proxy statement, but it was buried in the footnote.

In the later two documents, the 1971 prospectus three months later and the October 6, 1972, prospectus, this disclosure was in the text of the document, and this is simply to show the page position of these particular disclosures.

THE COURT: I'll take it. I will receive 35.

MR. ODELL: 37.

jgh 7

THE COURT: Isn't that in? Don't we have a 10K in evidence?

MR. SILVERMAN: I think so, your Honor. We are trying to check through the exhibit to make sure.

MR. ZULACK: We had about 34 or 35 conversations on exactly what the figures were, and we came upon these figures and we feel that it is an easier presentation

THE COURT: I take it there is no problem with 37 other than that it might be cumulative.

MR. SILVERMAN: Very well.

THE COURT: Then we'll take it.

MR. ODELL: 40(a).

MR. SILVERMAN: No objection.

MR. ODELL: 41.

MR. SILVERMAN: I don't understand the relevance of this, your Honor.

THE COURT: I'll accept it.

MR. ODELL: 42.

MR. SILVERMAN: No objection.

MR. ODELL: Your Honor, I believe 43 was admitted in evidence yesterday in connection with Mr. Gardner's testimony.

Am I correct about that?

MR. SILVERMAN: I believe you are right.

jgh 8

MR. ODELL: 44.

MR. SILVERMAN: Objection, your Honor. The Glen Alen 72 and 73 out of those years' operations cannot be relevant.

THE COURT: Yes. What about that?

b3 MR. ODELL: Several things about that. First, the dividends that were paid after the minority was taken out, of the total dividends paid, almost doubled what they were in 1970 when the minority was in this company.

Secondly, the fact that Schenley was able to pay out the total amount of its earnings, roughly, of this $26,000,000 in each of these years is a further indication of the surplus cash and the ability of this company to generate additional cash after the date of this merger.

MR. SILVERMAN: If they earned the money and paid it out a year or two later, it would be not relevant to a disclosure case involving 1971 --

THE COURT: I'm going to sustain that objection.

MR. ODELL: One other thing. In 1970, the 1.[illegible] million was roughly half of the earnings of the company. Once the minority stockholders are out, we find practically all of the earnings being paid out in dividends. And Schenley as the financial statements in evidence show, had such a large pool of cash available for the payment of dividends

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jgh 9

that it could have paid in 1969 and 1970 and it didn't pay, and that it chose to pay them at a much increased rate after the merger rather than before, it seems to me, is a relevant fact.

MR. SILVERMAN: Relevant fact to disclosure in a --

MR. ODELL: I am not saying it has to do with disclosure.

THE COURT: I sustain the objection.

MR. ODELL: I think it has to do with value. 45, your Honor.

THE COURT: 45 only makes sense if 44 is in.

MR. ODELL: I should have put in 44.

Your Honor, the rest of the undisputed facts are those that the defendants wanted in. It seems to me I have no obligation with respect to them.

THE COURT: You offer what you want. At such time as they present their case, if they want it, they will offer it.

All right.

MR. ODELL: I would like to go next to the interrogatories and the answers, the interrogatories propounded by plaintiffs and the answers supplied by defendants that are marked Exhibit 101 for identification.

jgh 10

Unless Mr. Silverman has some objection, I would like to offer the entire set of interrogatories propounded by the plaintiffs and the answers by the defendants, the defendant Schenley.

MR. SILVERMAN: 101, Schenley's answers to plaintiff's interrogatories 1, 2 and 3?

MR. ODELL: That's right.

MR. GLUCK: You want to offer all the answers?

MR. ODELL: I want to offer all the answers at this time except those two or three interrogatories contained in my interrogatories that dealt with expert testimony that you expected to give.

MR. SILVERMAN: Show us what you want to offer, would you?

Your Honor, as I understand it, the only things that my friend wants to offer are the answers to questions 1, 2 and 3, and I think we should do them individually so that we know what it is we are dealing with.

MR. ODELL: It is more than 1, 2 and 3.

MR. SILVERMAN: What does the pre-trial order say? Or are we paying no attention to that?

THE COURT: Why don't we take our recess at this point and you and Mr. Silverman discuss this.

(Recess)

2 MR. ODELL: Your Honor, I am happy to
3 announce that we have been relieved of an onerous burden
4 of passing on the relevance of some interrogatories.
5 THE COURT: Very good.
6 MR. ODELL: At this last stage of the
7 case we can find areas of agreement between adversaries.
8 With respect to interrogatories of plaintiff
9 and the answers of the defendant Schenley to those interro-
10 atories and defendant Chernow to those same interrogatories
11 we have agreed that questions number -- interrogatories
12 numbers 9 through 17, and the answers to those interrogato
13 ies, subject to one qualification which I will make,
14 there is no objection to their admission in evidence.
15 The qualification being that some of those answers contain
16 references to page testimony of Mr. Goldberg or Mr.
17 Chernow, and Mr. Gluck is not sure that that was not sup-
18 plemented but since both depositions are in evidence the
19 page reference given in these answers are subject to amend-
20 ment by the actual testimony that is in the record here.
21 Now, we cannot agree on certain of these
22 interrogatories, and the basis of our disagreement is,
23 your Honor, that they go to questions of value and I was
24 more concerned with these answers as an offer of proof
25 with respect to the common law case than to the non-

disclosure case.

And I would like to suggest, if my opponents have no objection that the interrogatories 28 through 30, and 35 to 37, and the answers given thereto, be treated as an offer of proof on my part rather than any kind of a concession or admission that the answers may contain as far as the defendants are concerned.

THE COURT: I am not sure I understand that.

MR. ODELL: Well, perhaps I have telescoped it too much.

THE COURT: Well, you don't need to make an offer of proof on a theory that I have ruled out.

MR. ZULACK: Right, I understand that, your Honor. I understand why the position that we may make a motion to reargue, at that time if it is granted, then we can put in evidence, but right now that claim is not before you, as I understand it.

THE COURT: That's right.

MR. ODELL: All right, your Honor, very good.

Well, the other exhibits that I would like to offer are those few exhibits here dealing with -- I would like to offer in evidence portions of the transcript of an exhibit that the defendants expected to offer, at least to put us on notice that they expect to offer, and that

is the transcript of the argument that was held before Vice Chancellor Marvel inthe case entitled David J. Greene & Company against Schenley Industries, Inc., and there is a statement that was made inthe course of the argument by counsel for Glen Alden that I would like to read into the record.

MR. SILVERMAN: What page?

MR. ZULACK: 36 and 37.

It starts at the bottom of page 36 and goes to 37.

MR. SLVERMAN: Is this being offered for the fact that Mr. Arsht said it, or is it being offered for the truth of what Mr. Arsht said.

MR. ODELL: This is offered for the truth of Mr.Arsht who was counsel for Glen Alden in that proceedin and the fact that he said it.

MR. SILVERMAN: Let's hear it and then let's see what --

THE COURT: This is aproceeding in Delaware Superior?

MR. ODELL: Delaware injunction proceeding.

THE COURT: What is the date of the hearing?

MR. ODELL: June 9, 1971.

THE COURT: And the name of the case is what?

MR. ODELL: David J. Greene & Company, et al. vs. Schenley Industries, Inc.

This is Mr. Arsht speaking to the Court.

"Additionally Mr. Levy --" and Mr. Levy may I say parenthetically was counsel for the plaintiffs in that case -- "...Mr. Levy has pointed out and said Schenley has some $150 million of surplus cash. It has. That is one of the facts in the case. As the Court might expect, and as the Court would have a right to criticize, if management had not made plans for the utilization of this amount of cash the defendants have."

The rest of the argument deals with the reques for a bond --

THE COURT: Where does the quote stop?

MR. ODELL: I have just finished the quote. The quote stops at the words "the defendants have."

The rest of the page --

MR. SILVERMAN: If you are not offering it, let --

MR. ZULACK: We are offering it?

MR. SILVERMAN: The rest of the page too?

MR. ODELL: No, I am not offering the rest of the page. I am offering that portion that I read.

MR. SILVERMAN: Your Honor, for what it is

worth, if your Honor will accept my statement that Mr. Arsht is a member of the firm of Morris, Nichols, Arsht & Tunnell, who were Glen Alden's counsel in the injunction action which sought to enjoin this very merger in which he joined me in the argument, and is not an expert -- what I am trying to indicate is that he is an attorney who represented Glen Alden and made the statement that is reported.

MR. ZULACK: That is fine, Mr. Silverman.

THE COURT: Very good.

MR. ODELL: Next I would like to offer in evidence portions of a statement made by Mr. Levin of Rubin, Wachtel, Baum & Levin on behalf of Mr. Riklis and certain other defendants, a statement made by him before the Referee Sauel A. Neuberger, who was appointed by the Court, Supreme Court of the State of New York, to pass on the fairness of the settlement in the case entitled Sanders et al against Meshulam Riklis, et al. It is the subject of one of the undisputed facts that you have admitted -- the reference to that case is in an undisputed fact which has been admitted in evidence.

And this is a statement made before the Referee by Mr. Levin at pages 31 and 32.

First Mr. Levin makes this statement:

"First I would like to say this. I would like for the documents which were submitted in connection at least with the opposition to that motion to be introduced in this proceeding.

"The Referee: They will be, Mr. Levin.

"Mr. Levin: I think the annual statements of the respective companies would bear out what I am going to say that what was contended to be proper and prudent business judgment in 1968 with respect to the future of the respective companies acquired and the amounts paid for those companies, history has proven this judgment to be correct."

This is a hearing on March 19, 1971, at which this statement was made.

And I go on to read: "As a matter of fact, Schenley and Stanley-Warner to the extent to which this complaint attacks that acquisition have proven to be very prudent and providential and wise acquisitions."

That is all of the statement I wish to read and I will be glad to explain the relevance of it to your Honor if you would like.

THE COURT: Any objection?

MR. SILVERMAN: For what it is worth, your Honor.

THE COURT: Received.

MR. ODELL: May I offer the judgment and order in that same case in evidence?

MR. SILVERMAN: No, I will object to that.

MR. ODELL: Your Honor, the next step in the progress of that litigation was the report of the referee which found that the settlement that was there agreed upon of that case was fair and equitable. That settlement provided --

MR. SILVERMAN: I will object to reference to any settlement of another case. I do not understand its relevance to the issues before your Honor in a disclosure case involving a proxy statement in '71.

THE COURT: I don't see that that is relevant.

MR. ODELL: Your Honor, I believe all of this has to do with one of the big points that we made in the case of our non-disclosure argument, that this proxy statement should have disclosed the opinion of the management of Glen Alden that its investment in Schenley had not declined since acquisition in 1968.

Now, this litigation of Sanders against Piklis, it attacked the acquisition of Schenley on the ground that Glen Alden was paying an excessive price in 1968 for Schenley, and that to the extent an excessive price

was being paid that the management was dissipating the assets of Glen Alden.

The settlement took the form of a reduction of the finders fee, I believe, that was paid to the people who brought Schenley to the attention of Glen Alden.

The proxy statement, I believe, talks about that, and it was a fee, I believe, of $5 million that was paid in connection with that acquisition of Schenley by Glen Alden.

The settlement in this case reduced -- the settlement provided for a refund of part of the fee, and went on to provide for a dismissal of those counts of the complaint that charged that the price paid for Schenley was excessive.

And I am offering this as proof, both the referee's report and judgment, I am offering as proof of the fact that those charges of excessive payment for Schenley were ill-founded at the time they were made and the company, the defendant, Glen Alden took that position and succeeded in that litigation in prevailing on the point that they did not pay an excessive price for Schenley in 1968.

Now, that is the purpose of this proof.

THE COURT: Well, I can't take the decision

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of another tribunal, because I am not prepared to accept that without relitigating that entire matter.

MR. ODELL: Well, I don't think you have to relitigate.

THE COURT: Don't you have Mr. Riklis' testimony here to somewhat the same extent? I will sustain an objection.

MR. ODELL: I don't want to take too much time fussing about this. The purpose of these two reports is to show the basis for dismissing the complaint.

THE COURT: I will sustain the objection.

MR. ODELL: That is all I have to say.

I would also like to make an offer of proof of these documents. They are being identified in the record as Exhibit Number 94A for identification and 95 for identification.

THE COURT: Very well.

MR. ODELL: Your Honor, the plaintiffs at this point have no further evidence.

THE COURT: The plaintiffs rest?

MR. ODELL: Yes.

THE COURT: All right.

MR. SILVERMAN: Your Honor, we may finish before lunch.

THE COURT: Do you want to reserve motions?

MR. SILVERMAN: Until the end of our case.

THE COURT: Why don't we reserve motions.

Go ahead.

MR. SILVERMAN: If your Honor please, may we have five minutes, but we will finish before lunch.

THE COURT: Absolutely.

Let me know when you are ready.

(Recess.)

MR. SILVERMAN: We will call Mr. Chernow, your Honor.

D A V I D A. C H E R N O W resumed.

THE CLERK: Mr. Chernow, you remain sworn.

DIRECT EXAMINATION (continued)

BY MR. SILVERMAN:

Q Mr. Chernow, how much was transferred by Schenley to Glen Alden in connection with the merger?

A On June 17, 1971, $81.3 million was transferred to Glen Alden for the acquisition of the debentures.

Q Let me take you back for a moment. Do you have Exhibit 17B which is the May '71 balance sheet?

Mr. Zulack, do you have that?

MR. ZULACK: Yes, I do.

I have my own personal copy (handing).

Q Mr. Chernow, how much cash and marketable securities and certificates of deposit did Schenley have following the sale of Buckingham?

A On May 31, 1971, this consolidated balance sheet shows a total of $175 million of cash on hand and in banks and marketable securities.

Q And that is Exhibit 17B for the record?

A That is Exhibit 17B, yes, sir.

Q Now, there had been a sale of Buckingham by Schenley when, when did that close?

A That closed on May 10, 1971.

Q And how much was received?

A $120 million.

Q Now, in accordance with the May 31, 1971 balance sheet, I think your testimony was that $175 million of cash and marketable securities is shown?

A That is correct.

Q Is that right?

A That is correct.

Q Now, was a certain portion of that pool of $175 million used in connection with the reorganization?

A Yes,it was.

Q You testified that $81,300,000 --

A Yes.

Q -- was sent up to Glen Alden on June 17, '71, is that correct?

A That's correct.

Q Did there come a time when any amount of that $81 million came back down from Glen Alden to Schenley?

A Yes, sir.

Q How much and when?

A On September 17, 1971, approximately $20.3 million came back to Schenley.

Q So that if you reduced the amount that came back from that which went up, you get approximately sixty or sixty-one million?

A Sixty-one million, correct.

Q Now did any portion of that twenty million thereafter go back up to Glen Alden?

A Yes, it did, sir.

Q Within what period of time did any portion, substantial portion, go up?

A During the period from September 1971 through September 30, 1975, fifteen million point one went back up to Glen Alden to purchase the debentures.

Q So that as of September 30, 1975, the total amount that went from Schenley to Glen Alden in connection with the merger was 76.1 million?

A Yes, sir.

Q Now, were any other funds transferred out of that pool of $175 million which existed on May 31, 1971? Was anything transferred out of that pool in connection with the reorganization that did not go to Glen Alden?

A Yes, sir.

Q How much?

A Approximately $17 million was set aside and/or distributed to the minority shareholders.

Q That was the cash portion that was going out in the merger directly to the minority shareholders?

A That is correct.

Q Now, sir, out of the pool of $175 million. except for the money that was sent up to Glen Alden, in connection with the merger, were any additional funds out of that pool sent up to Glen Alden?

A No, sir.

Q Can you explain the reason that 81 went up and 2[illegible] went down and 15 went back up?

A Yes, sir.

Q Why that movement, Mr. Chernow?

A The original acquisition of the debentures for 81.3 million was related to or premised upon the distribution of debentures and cash to each and every one of the

outstanding minority shareholders of both the common stock and the preferred stock.

As time went on, a number of shareholders indicated that they were going to exercise their rights of appraisal, and therefore, money came back to Schenley so that Schenley would have the cash on hand for that eventuality.

As further time went on, a number of stockholders dropped out of the appraisal procedure and took the original offering, and therefore, debentures were purchased, they were returned, they were repurchased as the individual stockholders decided that they would take that over.

Q The figures you are testifying from came from the books and records of Schenley, do they not?

A They do come from the books and records of Schenley, yes, sir.

Q And do you have the register sheets that reflect all of that material before you?

A I do.

Q And do you have a summary schedule of that which you have just testified to?

A Yes, I do.

MR.SILVERMAN: If your Honor please, I will offer it so that it will be in a written form rather than

relying on Mr. Chernow's testimony which may have to be pieced as Defendants' Exhibit A.

MR. ODELL: May I see it?

MR. SILVERMAN: Yes, of course. As a matter of fact I would only offer the summary sheet.

MR. ODELL: No objection, your Honor.

(Defendants' Exhibit A was received in evidence.)

Q Mr. Chernow, what happened to the rest of that pool of cash and marketable securities?

A The rest of that pool was used in the business and operations of Schenley because it was necessary for the reduction of debt, for the payment of accounts payable. for the investment in added inventories, added receivables, and it continues until this day in constant usage in the business and operations of our company.

Q Was it the judgment of the management of Schenley that the money, the extra -- that which was not sent up to Glen Alden or sent out to the shareholders was needed in the business of Schenley?

A Yes, it was.

Q Is that a judgment made by the management?

A Certainly was.

Q And all of that money has to this day been used

in the business of Schenley, is that correct?

A Yes, sir.

Q Sir, let's revert to the issue of used barrels. Remember that testimony during the course of this trial?

A Yes.

Q Did anything occur in 1971 which led you to consider the writeoff of used barrels?

A Yes,sir. I think I should put this in a little perspective because it is something that you just can't review by looking at numbers per se.

Q Proceed, tell us.

A Used barrels, while not a very significant portion of our business, has always been something that we paid attention to. Used barrels are a byproduct, if you will, or an end product, of the dumping of bourbon barrels, and that, you might call, a supply side of the equation.

The demand side of that equation is the combination, if you will, of all the Canadian and Scotch distillers who by the laws of their land can store their whiskey in used barrels, and so, the question of supply and demand plays a very important role in used barrels.

There are times when the price vacillates, you don't really know that there is a set price, since the

1 meb-17 Chernow-direct 934
2 question of how much the Scotch and Canadian distillers
3 decide to distill is the big factor on the demand side.
4 The supply side is influenced by the number of
5 barrels being dumped by American bourbon distillers.
6 Now, as I indicated, through the years, and
7 this goes way back to the beginning, there has been constant
8 vacillation and no exact determination of what you are going
9 to sell your available pool for -- from year to year you
10 look at it and there are times you say, well, we may not
11 be able to get all we think we can, and we did on
12 occasion set up a small reserve, if we thought the market-
13 place might not be that good.
14 Certain things happen, though, partially, as
15 the result of light whiskey -- excuse me, sir, may I have
16 some water? My throat is a little dry.
17 Thank you.
18 (Pause.)
19 A (continuing) Certain things happened though
20 that were upsetting what you might call the historic
21 balance between supply and demand or the minor vacillations.
22 The U. S. Government authorized the production
23 of light whiskey, and light whiskey produced in the
24 United States supposedly to compete with Canadian and
25 Scotch whisky, United States used barrels Therefore,

there is one segment of the supply equation that is going to be diminished to the extent you produce light whiskey in the United States.

At the same time, the demand in the world market and in the U.S. market for Scotch and Canadian whiskeys was going up, and so the Canadian and Scotch distillers felt that they had to distill more than merely replace what they were dumping each year in anticipation of years ahead requirements.

The net result of that during a period of time that we were quite enthusiastic for that period, about our projections and what might take place, and what recovery we might make for the barrels that we were dumping.

However, along comes 1971 and two factors come into play. There becomes some degree of apparent attitude on the part of the American distillers that light whiskey may not be the cure-all, may not be the salvation of their conpetition with Canadian whiskey and Scotch whiskey and therefore, many of the distillers severely curtailed their own ongoing production of light whiskey.

That put more barrels into the pool that is available.

At the same time, the Scotch people suddenly realize that they were laying away a heck of a lot of

gallonage, perhaps more than they might reaonably foresee usage for, and so in 1971, on a specific visit, by our vice-president in charge of our cooperage division, the barrel division, which was responsible for the disposal of these used barrels, on a visit of his to Scotland, because the Scottish people, the Scottish distillers, were the largest purchasers, he came back with the sad word that they were not going to be buying any additional used barrels for a period of time until they could reconstitute their Scotch distilling program.

With that news, in 1971, we decided that since the barrels had been accumulating in our pool of available cooperage, at increasing costs -- in other words, more expensive barrels were coming into the pool of used barrels, raising the average cost -- we decided that it would be appropriate for us to establish a salvage value equivalent for those barrels in our pool, which we did at the end of 1971 -- yes, in December of 1971.

I hope I have answered your question.

Q I am sorry?

A I hope I have answered your question.

T5 Q You have, indeed.

The visit to the Scottish people took place about when in '71?

A I would say in the early fall of 1971.

Q After the merger?

A Yes, sir.

Q And when that report came back, did you then consider the writeoff of used barrels?

A Yes.

Q Did you, prior to the end of '71, ever consider the writeoff of used barrels?

A No.

Q Let me turn your attention now to light whiskey. Did anything occur in 1971 with respect to light whiskey which led you to consider its writedown in '71?

A Yes. And here again --

Q Explain it to the Court.

A And here again I do have to cast a little background for this.

As I indicated in response to the previous question, the government authorized the distillation of light whiskey for its initial production in 1968. The background of that was a recognition on the part of the industry and on the part of the government that domestic whiskeys, bourbon

and blends, were losing ground to the increasing popularity of Canadian whisky and Scotch whisky, and therefore authorized a new standard of identity for a new whiskey.

Without getting too technical, it is produced at a different proof and in a slightly different manner, and it is also stored in used barrels, as I indicated before.

The hope was that light whiskey would prove to be an effective competitor for what is called bottled in the U.S. Canadian whisky and Scotch whisky. Those categories do provide a reasonably generous profit margin.

And so in 1968 and the early periods when all the distillers, without really knowing what the end product might really be, started to lay it away, laying it away for inventory because the government at that time said that you could not sell it prior to July 1, 1972, we all had optimistic visions of good profit margins.

As time went on, we all laid away additional light whiskey. In 1971, two competitors attempted to get the jump on the market.

Q Mr. Chernow, let me interrupt you.

A Yes.

Q When was the first time that it would be permissible to sell light whiskey?

A I think I indicated July 1, 1972.

Q Okay. So in '68 you laid it away.

A Yes.

Q And something happened in '71 before any light whiskey had in fact been sold.

A Yes, sir.

As I indicated, two of our competitors, or two competitors in the industry, thought they would get a jump on the market place. They came out with a product, while not legally light whiskey according to the standards of identity of the government, which were somewhat similar in their, shall we say, taste projections, in their lightness, and it was their hope to get a jump on the rest of the market and be positioned with certain brands when it became legal to introduce the new light whiskey.

Q Who were these and what were the brands?

A Yes. The two people were Barton Distilling Company, with a brand called Q.T., and the other one was the Brown-Forman Distilling Company, with a brand called Frost 8/80. 8/80 is what they call it.

And of course they came out with a big initial promotion and a certain amount of initial advertising.

And it was during 1971 that we recognized that the consumer was not equating this light whiskey with the Scotch and Canadian that it was originally envisioned to

compete with, and it became apparent to us that here is an area where, if it was going to go at all, it was going to go at a highly competitive price with rather thin margins which was not the original perspective that we had all thought would exist when we laid it away in 1968.

Therefore, recognizing that our light whiskey in our company's inventory carried higher costs than would have existed had we distilled all of it from grain in the original instance rather than to include some portions of redistilled product, we decided that in order to have a product that at least would move we would have to price it at a level that we felt our competitors would be pricing it at in the subsequent July 1st and, so, wrote it down to remove from the light whiskey inventory those costs that were attributable to redistillation from other initial products.

xx Q When was that decision made?

A Towards the end of 1971.

Q Prior to the making or the consideration of that decision, had any thought ever been given to the writedown of light whiskey?

A No, sir.

MR. SILVERMAN: I have no further questions of Mr. Chernow.

jgh 5 Chernow-cross

MR. ODELL: Your Honor, I do have a few questions, but I need a few minutes to gather my material.

THE COURT: Is this your only witness, Mr. Silverman?

MR. SILVERMAN: My only witness, and then another two minutes to do a couple of things.

THE COURT: Do what preparation you want. I'll stay right here.

(Pause)

CROSS-EXAMINATION

BY MR. ODELL:

Q Mr. Chernow, you spoke about the $81,300,000 going out to Glen Alden in purchase of the debentures on June 17th and the return of that money on September -- when, did you say?

A September -- not all of it; some portion of it.

Q You said some $20,000,000, $20,300,000.

A Right. September 17th, I think, was the date.

Q And when that money was returned to Schenley, was that money available for any corporate use of Schenley?

A In approaching the needs of the reorganization and merger, we set aside separate funds for the requirements related to paying the minority stockholders.

Q Was this, the return of this $20,300,000, put into

a special fund called an escrow fund?

A Essentially yes.

Q As a reserve against the possibility that it would have to go out again to the stockholders?

A Yes.

Q And was that reserve created by any requirement of the loan agreement or any of Schenley's creditors?

A Not to my knowledge, no.

Q And that $20,000,000 that was put into this escrow fund was invested in what? Short term paper, federa funds?

A Essentially.

Q It bore interest rates. What kind of returns?

A Whatever the then current rate for those instruments might be.

MR. ODELL: No further questions.

THE COURT: Thank you very much, sir.

(Witness excused)

jgh 7

of October 31, 1970, and the Wall Street Journal article of November 2, 1970, all of which announced the terms.

The purpose of the offer is to indicate that there was a public disclosure of the fact of the sale of Buckingham.

MR. ODELL: No objection, your Honor.

xx (Defendants' Exhibit B was received in evidence.)

MR. SILVERMAN: If your Honor please, I will offer certain portions of an affidavit submitted by Carl Glick in the David Greene v. Schenley action in the Court of Chancery in the State of Delaware, which, as I indicated in my opening, spoke to the disclosures in the proxy statement with respect to the cash that was going up from Schenley to Glen Alden.

Your Honor will recall that I read a portion of that in. But that is not in evidence. I therefore would offer that portion of the affidavit dealing with the material that I read together with the front page of the affidavit so that your Honor may merely identify the person who is the affiant.

MR. ODELL: Are you offering this for the truth of what it says?

MR. SILVERMAN: I am not offering it for the truth. I am offering it for the fact that Mr. Glick said it in a

jgh 8

case involving this merger and this proxy statement.

MR. ODELL: And you are referring particularly, I take it, to the $155,000,000 in surplus cash?

MR. SILVERMAN: And the references to where that may be found in the proxy statement.

MR. ODELL: I have no objection to this, provided it is considered in connection with Mr. Arsht's statement that was read into the record that Schenley had $150,000,000 in surplus cash.

MR. SILVERMAN: You don't want the judge to read this unless he at the same time reads Mr. Arsht's statement.

MR. ODELL: I think he ought to hear what both sides have to say.

MR. SILVERMAN: That is the purpose of the offer.

xx (Defendants' Exhibit C received in evidence.)

MR. SILVERMAN: Your Honor, I would offer that portion of the affidavit of Lawrence J. Goldstein, also submitted in the Delaware injunction action, which deals with -- well, there is a notation "Surplus cash," and I have annexed to it the first page of the affidavit so that your Honor may identify the affiant.

MR. ZULACK: Your Honor, we would have no objection to these affidavits, provided that the entire transcript of the hearing in Greene be offered, principally

jgh 9

because we believe that the transcript puts in proper perspective the haste with which the papers were prepared, the fact that it was offered on a preliminary basis and that the attorneys for the plaintiff in that case said that they had very little time to prepare their case, and I think that the preparation of these particular affidavits should just fairly be put in that context.

b3 MR. SILVERMAN: If your Honor please, I will accept my friend's characterization, and with the haste and with the speed and the lack of attention it was perfectly obvious to the affiant that the proxy statement made the disclosures which my friends here are contending have not been made.

MR. ZULACK: I am not trying to argue the purpose of it.

MR. SILVERMAN: I am not either. I am offering only that portion, not for the truth but for the fact that it was said.

MR. ZULACK: Are you offering the whole record?

MR. SILVERMAN: No, sir. I am offering only those excerpts which go to the matter that I believe to be relevant in this proceeding.

MR. ZULACK: I really think it is fair to put in-- I'm not asking for the whole record, but this is a transcript --

jgh 10

MR. SILVERMAN: These are affidavits.

THE COURT: Mr. Silverman has embraced what you said you wanted to prove by the transcript.

MR. SILVERMAN: With alacrity.

THE COURT: Do you feel you need the transcript, now that you have his concession?

MR. ZULACK: Yes, I do, your Honor. I just feel that it was a fairly lengthy hearing and I think, if one reads the transcript, it clearly puts these affidavits into context.

I have no objection to anything from the case as long as it is put in proper context.

THE COURT: How long is it?

MR. SILVERMAN: It is a very long transcript. It is a long transcript. The problem that I have is that that was a fairness case. The issue was fairness in the Delaware case.

To put that proceeding before you, I suggest, is to engage in an exercise that your Honor has already determined.

If my friend would like to go through that record and point out anything that casts doubt on what I am offering, and I would suggest that that cannot be done because all they are doing is talking about what is in the proxy

statement, I have no objection to his supplementing the record in that regard, but not on this broad wanting to look at it in context, because the context of that case was a fairness case and I am not offering it in that capacity.

MR. ZULACK: I am not asking that the transcript be looked at in the context of a fairness case. I am aski that the transcript be looked at in connection with how it relates to the preparation of the case.

MR. SILVERMAN: I have acceded to my friend's request.

MR. ZULACK: This is a portion of the transcript from which Mr. Odell already read. I really don't think it is going to burden the record any more than it is already burdened to have it in.

MR. SILVERMAN: Mr. Zulack is terribly good, and it is an appealing argument. Yesterday he asked your Honor with a tremor in his voice, to please let him put material in which perhaps might otherwise have been excluded, and I think your Honor did it, and I think we all complimented Mr. Zulack today.

Now again we have the same thing: Won't you please, Judge, put it in, in a sense "and do me a favor?"

That is not a basis, I suggest, for the trial of a lawsuit.

THE COURT: Do you object to Exhibit D for identification if the transcript does not go in?

MR. ZULACK: Yes, your Honor.

THE COURT: And what is the basis of of your objection?

MR. ZULACK: I'm just restating what I said before, your Honor. I don't think you can possibly understand tne purpose for which it is going to be used unless it is --

THE COURT: As I understand the purpose for which it is going to be used, it, frankly, is --

MR. ZULACK: Marginal.

THE COURT: -- to some extent a usurpation of the Court's function here in that you are urging, since Mr. Goldstein found this, that I also find it, that is, the ease with which the Court can reach the same conclusion based upon a plaintiff whose self-interest was presumably to the contrary.

MR. SILVERMAN: Yes, your Honor. As a matter of fact, you are right as far as you go. But I think it always was the law until comparatively recently that, for example, the plaintiff, when reliance was once in the law, had to come in and say, "I read it and I understood it to mean something" or "I didn't understand it to mean somethi

1 That testimony was always admissible.

2 I would be delighted if we had, for example,

3 and I would argue, although it is not necessary for this

4 argument, a public opinion poll, if that could be done under

5 appropriate circumstances, would be relevant.

6 I am merely suggesting that this is another fact,

7 surely not dispositive and not, indeed, a usurpation of

8 your Honor's function, but something that your Honor might

9 want to consider for such value as it might have.

10 MR. ZULACK: Your Honor, my final point on that

11 is that I understand Mr. Silverman is offering these to say

12 that if anyone read the proxy statement they could have

13 deduced what these sophisticated investment bankers deduced,

14 and I really don't think it is probative of what the

15 reasonable investor would presume from the proxy statement,

16 because the reasonable investor would not have the expertise

17 of these gentlemen.

18 I am simply asking, and without great insistence,

19 your Honor, that we put in the transcript to show the context

20 in which those documents were prepared and used.

21 THE COURT: I am going to deny the proffer of the

22 exhibit.

23 MR. SILVERMAN: Since my friend offered Mr.

24 Arsht's statement on the record of the argument, I think

25

I would like to offer that portion of the argument which is Mr. Levy's, not an investment banker but an attorney, who made the argument with respect to what appears from the face of the proxy statement which entitles him to an injunction because it is so clear that there is no fact or dispute as to surplus cash and the amount that is going up.

b4 Mr. Levy's argument appears at pages--

THE COURT: Mr. Levy was arguing for --

MR. SILVERMAN: Arguing for Mr. Greene.

THE COURT: For Mr. Greene, the plaintiff.

MR. ZULACK: These are pages from the transcript. Mr. Odell just read portions of the transcript which referred to Mr. Levy's argument. It just seems to me to be of no use whatsoever to excerpt pages from the transcript. Again --

MR. SILVERMAN: It was of no use except when Mr. Odell did it for two lines of Mr. Arsht. Then it had use. When I seek to --

MR. ZULACK: I don't object to the introduction of the document. I just think it is unfair to take a couple of pages out simply because we are introducing it today at five minutes to 1. It might very well be that those pages might be in reference to another page.

MR. SILVERMAN: If you want to offer any specific

1 jgh

2 points, I assume that you will offer it and we will discuss

3 it.

4 THE COURT: What other pages do you wish to offer?

5 MR. SILVERMAN: Pages 12 and 13, with the frontal

6 piece, page 3, so that your Honor can see that Mr.Levy is

7 talking. But it appears on pages 12 and 13.

8 THE COURT: Why don't I take it and I'll assign it

9 such weight as I shall eventually determine.

10 MR. ZULACK: Your Honor, just for the record,

11 I am going to object to that unless we can have the

12 entire transcript of 76 pages, of which now we have two

13 portions in and two documents which are referred to in here.

14 THE COURT: I am not going to simply take a

15 transcript blindly. If there is something in there to which

16 you have reference that you want to call to my attention,

17 I will consider it. But I see no point in putting in 76 pages

18 of lawyers' argument.

xx 19 (Defendants' Exhibit E received in evidence.)

20 MR. ZULACK: May we, just so we have an accurate

21 statement on the record, put in the two or three pages?

22 When Mr. Odell introduced the statement that Mr.

23 Arsht said and what Mr. Levy had said in this case, that

24 there is $150,000,000 in surplus cash, that is a fact in

25 this case. That argument continues and it refers to

1 give and take between Mr. Levy and Mr. Arsht.

2 Mr. Silverman is now introducing two or three

3 pages from Mr. Levy's argument. I contend that Mr. Arsht's

4 argument is slightly longer, and I would like to have an

5 opportunity to put those two or three pages of the 76-page

6 transcript in.

7 THE COURT: Fine.

8 MR. SILVERMAN: If you want to offer something in

9 rebuttal, let him offer it and we'll discuss it then.

10 THE COURT: Yes. Go ahead.

11 MR. SILVERMAN: My last offer, your Honor, is

12 a statement made by Mr. Odell in this case before Judge

13 Sugarman in which, while I will not characterize it, it does

14 speak for itself -- there is no reason why I shouldn't

15 characterize it: where he makes it clear that from

16 the face of the proxy statement one can tell exactly how

17 much cash is surplus and how much cash is going up. And

18 that was one of the grounds for his injunction motion.

19 Mr. Odell's statements are not in a different

20 case, they are in this case, and I offer that portion of his

21 argument that reflects what I have just indicated. That is

22 on pages 17 and 18 and 19.

23 MR. ODELL: Of how long a transcript, Mr.

24 Silverman?

25

MR.SILVERMAN: I don't know.

MR. ODELL: Your Honor, I don't think the transcript of this thing was more than 25 pages long.

Secondly, I'm not denying anything I said on that transcript. I would just like to point out that I did have, as Mr. Levy had and other people had, the opinions of expert investment banking people.

Thirdly, I would like to point out that the denial of a restraining order, which is all I asked for in that case --

THE COURT: I don't think the outcome is of any consequence here. It is a question of whether what you said allegedly shows you blowing hot in one case and cold in another case.

MR. ODELL: I am trying to tell you, your Honor-

THE COURT: Mr. Silverman is saying, if you argue in one case that you can conclude from the proxy statement what is going up, and so on and so forth, that that sheds some light upon the merits of the case when you now argue to the Court that you cannot conclude that.

MR. ODELL: It is exactly that kind of implication that I am trying to answer here by saying --

THE COURT: All that is before us at this moment is the admissibility of these three sheets of paper. Do

you have any objection to those three sheets of paper?

I assume not.

MR. ZULACK: Your Honor, the pages I would like to designate --

MR. SILVERMAN: Wait. Wait. Wait.

MR. ZULACK: I'm sorry.

xx (Defendants' Exhibit F received in evidence.)

MR.SILVERMAN: If your Honor please, the defense has no further evidence to put in and therefore we rest.

THE COURT: Very good.

MR. ZULACK: Your Honor, in the form of a very short rebuttal, I would like to mark Mr. Arsht's argument on page 36 in the case of Greene v. Schenley Industries, through the first full paragraph on page 38, which I believe is responsive to the comments of Mr. Levy, as Plaintiffs' Exhibit 156.

MR. SILVERMAN: Your Honor, I will quickly voice an objection on the grounds of relevance to the issues that are before you and quickly sit down.

THE COURT: I will receive the pages.

xx (Plaintiffs' Exhibit 156 received in evidence.)

MR. ODELL: Your Honor, I hope that when you read these four pages of my argument before --

MR. SILVERMAN: Is this a summation or an offer

** ** ** ** **

This consolidated action, having come on for trial before the Court, the Honorable Richard Owen, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered on November 23, 1976, which, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, constitutes the Court's findings of fact and conclusions of law.

The Court finds that Plaintiffs represent the class consisting of the following members to whom notice was directed and who did not request exclusion pursuant to the provisions of Rule 23(c)(2) of the Federal Rules of Civil Procedure:

> Class I - All owners, except defendants, of COMMON STOCK and $1.40 CUMULATIVE CONVERTIBLE PREFERRED STOCK of Schenley Industries, Inc. (hereinafter called "Schenley Common or Preferred shares") as of the close of business on February 24, 1971.

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During the early and middle Sixties Schenley became a prime take-over prospect for Glen Alden and Lorillard Corporation. Glen Alden's interest began as early as July, 1964, and continued sporadically until 1968, when Glen Alden utlimately succeeeded in acquiring slightly more than 86% of the Schenley Common Stock in September of 1968 on the basis of $53.33 per share (Tr. 68 - 71). The architect of the Glen Alden merger with Schenley was Meshulam Riklis, who since 1965 was Chairman of the Board and Chief Executive Officer of Glen Alden and its parent corporation, Rapid American Corp. (DAX 5, p. 48). Riklis personally and through family members and family trusts owned over 12% of Rapid American's outstanding common stock and had options to purchase a large number of Glen Alden shares (DAX 5, 49 - 51).

Previous to the acquisition of Schenley, Riklis was aware of reports made at his direction indicating the significant value of Schenley's excess inventory and the marketing potential of certain dormant Schenley brands (DAX 2, p. 20, 38 - 39). Moreover, Riklis had the benefit of other studies pertaining to

redundant inventories

the whiskey market highly critical of Schenley's past marketing strategy, but emphatically bullish concerning Schenley's operating potential and the available opportunity for further marketing improvements under more aggressive management (DAX 3, p. 82 - 84).

Riklis was also advised by these studies of the feasibility of financing the Schenley take-over by the creation of long-term debt with substantial funding of the debt with the cash flow generated from the reduction of Schenley's inventory and accounts receivable over a period of eight years (DAX 2, p. 38 - 42).

Recognizing these inherent values in Schenley, Glen Alden conducted negotiations with Schenley in competition with Lorillard Corporation to purchase Schenley's business. Beginning in March, 1968, and terminating in September, 1968, Glen Alden, through a combination of private purchases, open market purchases and an exchange tender, culminated its bid for control of Schenley. In February or March, 1968, Riklis met with Rosenstiel (DAX 19, p. 34 - 36). As a result of this meeting, Riklis on behalf of Glen Alden, agreed to buy Rosenstiel's, and related persons', shares at a price of $53.33 per share, as adjusted for a three

for two stock split which occurred that month. It was then agreed that Glen Alden would tender* the same price for all other shares of Schenley Common Stock (DAX 13, p. 4; DAX 19, p. 37 - 44). On March 20, 1968, the purchase of the Rosenstiel stock was consummated. In April of 1968, Lorillard submitted a competing tender for Schenley's shares for a package of Lorillard common stock and debentures, valued from $78 to $79 per pre-split Schenley share (DAX 4, p [illegible] DAX 6(a), p. 6). On April 8, Lorillard increased its offer to the equivalent of $88 to $90, finally withdrawing that offer and terminating negotiations on May 6, 1968 (DAX 6(c), p. 6). During April, Glen Alden purchased an additional 110,000 shares of Schenley's Common on the New York Stock Exchange at an average price of $53.20 per share.

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*Upon the announcement of the proposed tender offer in the Spring of 1968, Glen Alden was assailed by what then was, and still continues to be a long series of law suits. One of these, Sanders v. Riklis, (Sup. Ct., N.Y. Co., Index No. 7206/1968) was a derivative suit on behalf of Glen Alden alleging that Glen Alden was being caused to pay an excessive price for the Schenley shares to be acquired pursuant to the tender offer (DAX 5, p. 10 - 12). Affidavits introduced into the present record by Dade affirming the reasonableness of that tender offer as of that point in time, have their origin in the Sanders litigation.

Finally, in August, 1968, the tender offer contemplated in March, 1968, was effectuated resulting in Glen Alden's 86% control position in Schenley by September of 1968 (DAX 13, p. 4).

Subsequent to August, 1968, the point at which time Glen Alden secured control of Schenley, the market witnessed the phenomena of Schenley's declining market price coincident with its improved sales performance, and fundamental changes within the Schenley corporate structure. The inconsistency between Schenley operating and financial performances on one hand and its market performance on the other hand is subject to various interpretations and hypothesis of the respective parties (Tr. 117 - 128; Tr. 599 - 619). Notwithstanding, certain basic facts concerning market trends are well documented. After August, 1968, the market price of Schenley stock on the New York Stock Exchange began to filter downward. During September, 1968, it stayed up around the tender offer price, but after October, 1968, the price started to drop almost immediately (Tr. 117, 617 - 618). In 1969, the stock traded at a low of 20-3/4 up to a high of 44-3/4. In 1970, the trading range went from a low of 19-1/4 to 28 (SHX 18). Trading volume in 1970 for Common amounted to 428,500 shares or 39% of the float (1,104,688) and for the $1.40 Preferred, 876,300 or 35%

RELIANCE INSURANCE COMPANIES

The information contained herein has been prepared from information taken from reports filed with the Secur Exchange Commission. With respect to the year ended December 31, 1967 such information was taken from Reliance' report on Form 10-K filed with the Securities and Exchange Commission. The information relating to the years ended D 31, 1966 and 1965 have been obtained from the Reliance Plan of Exchange. As a result of Reliance's acquisition of Pacific Insurance Company and its subsidiaries (see Note B to financial statements of Reliance), the financial stater the years ended December 31, 1966 and 1965 contained herein include by combination the applicable figures perta United and its subsidiaries as obtained from the Reliance Plan of Exchange without consideration to the possible e of intercompany transactions. (See "Sources of Information About Reliance".) The Securities and Exchange Commis not approve or disapprove or pass upon the accuracy or adequacy of the financial statements or of other information i it. This explanation should be read in conjunction with the other financial and supplemental statements of Reliance and notes appearing elsewhere in this Prospectus including the financial statements and notes of Reliance Standard Life and Pacific Life.

RELIANCE INSURANCE COMPANY
GENERAL CASUALTY COMPANY
PLANET INSURANCE COMPANY
PILOT INSURANCE COMPANY
REGENT INSURANCE COMPANY
UNITED PACIFIC COMPAN
CASCADE INSURANCE CO.

BALANCE SHEET—ADMITTED ASSETS
For the Year Ended December 31, 1967

	Consolidated	Reliance Insurance Company	General Casualty Company	Planet Insurance Company	Pilot Insurance Company	Regent Insurance Company	United Pacific Company	I (
Bonds (Consolidated Book Value $230,500,418)—Note G	$230,500,418	$106,435,408	$30,285,115	$29,486,265	$10,214,162	$3,806,664	$35,108,845	$1
Stocks (other than Stocks of Affiliates)—Note G								
Preferred (Consolidated Book Value $17,773,553)	15,389,529	10,956,570	0	0	3,428,291	0	1,004,65	
Common (Consolidated Book Value $110,829,931)	214,985,742	200,691,820	2,853,800	2,691,900	2,714,318	0	6,023,904	
Stocks of Insurance Affiliates—Note G								
General Casualty Company (Book Value $8,675,000)	0	14,576,617	0	0	0	0	0	
Planet Insurance Company (Book Value $15,045,298)	0	18,551,248	0	0	0	0	0	
Pilot Insurance Company (Book Value $618,757)	0	8,976,909	0	0	0	0	0	
Regent Insurance Company (Book Value $1,800,750)	0	0	2,113,543	0	0	0	0	
United Pacific Company (Book Value $20,135,137)	0	22,052,580	0	0	0	0	0	
Cascade Insurance Company (Book Value $3,425,000)	0	0	0	0	0	0	5,178,000	
Stocks of Non-Consolidated Affiliates—Note G								
Reliance Standard Life (Book Value $18,956,628)	22,916,772	22,916,772	0	0	0	0	0	
United Pacific Life (Book Value $1,000,000)	3,860,000	0	0	0	0	0	3,860,000	
Stocks of other Non-Consolidated Affiliates (Book Value $15,932,247)—Note G	13,988,406	13,988,406	0	0	0	0	0	
Mortgage Loans on Real Estate—Note H	4,877	0	4,877	0	0	0	0	
Real Estate (Consolidated Book Value $6,171,737)—Note I	4,565,116	1,835,801	894,293	0	235,614	0	1,465,295	
Collateral Loans	8,123,380	8,123,380	0	0	0	0	0	
Cash and Cash Items—Note J	10,850,198	7,661,962	621,041	231,500	563,598	100,813	1,642,234	
Agents' Balances or Uncollected Premiums—Note K	35,568,644	27,668,074	2,708,005	2,006,755	1,552,169	(26,938)	968,429	
Reinsurance Recoverable on Loss Payments	6,113,761	2,136,107	46,920	60,814	0	28,323	3,668,613	
Interest, Dividends, and Real Estate Income Due and Accrued	2,723,985	1,196,501	390,134	361,392	175,516	35,063	388,825	
Deposits with the Equities in Assets of Underwriting Group	8,031,791	8,031,791	0	0	0	0	0	
Inter Company Balances	0	758,424	16,163	0	0	0	0	
Prepaid Federal and Foreign Income Taxes—Note O	0	729,451	0	0	0	0	0	
Other Admitted Assets	3,684,332	2,628,589	590,390	0	61,687	0	400,181	
Total Admitted Assets	$581,306,951	$479,916,410	$40,524,281	$34,838,626	$18,945,355	$3,943,925	$59,708,994	$

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RELIANCE INSURANCE COMPANY
GENERAL CASUALTY COMPANY
PLANET INSURANCE COMPANY
PILOT INSURANCE COMPANY
REGENT INSURANCE COMPANY
UNITED PACIFIC COMPANY
CASCADE INSURANCE COMPANY

LIABILITIES, CAPITAL AND SURPLUS

For the Year Ended December 31, 1967

	Consolidated	Reliance Insurance Company	General Casualty Company	Planet Insurance Company	Pilot Insurance Company	Regent Insurance Company	United Pacific Company	Cascade Insurance Company
Losses and Claims—Note L	$139,821,711	$100,763,725	$12,330,811	$ 6,251,710	$ 4,432,457	$ 847,519	$11,935,268	$ 3,259,221
Loss Adjustment Expenses—Note L	15,897,635	11,063,148	1,624,284	721,791	30,000	106,982	1,920,527	430,903
Unearned Premiums—Note M	165,021,755	117,971,247	10,394,070	7,694,923	4,854,415	678,287	17,518,393	5,910,420
Dividends Declared and Unpaid to Stockholders	0	0	0	0	0	0	0	0
Contingent Commissions and Other Similar Charges	2,254,774	1,350,000	46,000	150,000	0	4,000	493,781	210,993
Other Expenses and Taxes (Excluding Federal & Foreign Income)	7,574,695	5,045,000	632,366	415,000	89,859	48,590	978,586	365,294
Federal and Foreign Income Taxes—Note O	617,472	137,229	400,000	25,000	409,943	65,000	38,637	271,114
Funds Held Under Reinsurance Treaties—Note N	3,176,746	2,370,270	0	0	0	0	652,637	153,839
Reserve for Unauthorized Reinsurance—Note N	3,427,168	3,324,898	1,706	98,997	0	1,567	0	0
Inter Company Balances	0	0	0	758,424	0	16,163	31,192	0
Other Miscellaneous Items	13,343,685	7,946,775	518,427	171,533	0	62,274	4,010,973	633,703
Minority Interest—Capital	13,796	0	0	0	0	0	0	0
Surplus	213,396	0	0	0	0	0	0	0
Commitments and Contingent Liability	0	0	0	0	0	0	0	0
Total Liabilities	$351,362,833	$249,972,292	$25,947,664	$16,287,378	$ 9,816,674	$1,830,382	$37,580,994	$11,235,487
Capital Stock—Note R								
(Class A Common $50.00 Par)	$ 4,045,250	$ 4,045,250	$ 0	$ 0	$ 0	$ 0	$ 0	$ 0
(Common $5.00 par)	23,566,100	23,566,100	1,500,000	2,000,000	204,500	1,150,000	3,050,140	1,000,000
Paid in and Contributed Surplus	47,081,396	47,081,396	265,000	13,000,000	409,102	650,750	5,600,560	2,425,000
Surplus—Note T	155,251,372	155,251,372	12,811,617	3,551,243	8,515,079	312,793	13,477,300	1,753,000
Total Capital and Surplus	$229,944,118	$229,944,118	$14,576,617	$18,551,243	$ 9,128,681	$2,113,543	$22,128,000	$ 5,178,000
Total Liabilities, Capital and Surplus	$581,306,951	$479,916,410	$40,524,231	$34,838,626	$18,945,355	$3,943,925	$59,708,994	$16,413,487

NOTES TO FINANCIAL STATEMENTS—(Continued)

Note S. Dividends:

Cash dividends per share declared and paid on Capital Stock during the last three years at the following rates: (Current dividend rate for Reliance is $.40 a share starting last quarter of 1966.)

	1967	1966	1965
Reliance Insurance Company			
Class A Common $50 Par Value	$16.00	$13.90	$13.20
Common $5 Par Value	1.60	1.39	1.32
General Casualty Company	40.00	30.00	26.66
United Pacific Company	.60	.45	.40
*American Equitable Insurance Company	0	0	.50
*New York Fire Insurance Company	0	0	.90

*Merged June 30, 1965

Note T. Surplus, Consolidated, is analyzed as follows:

		December 31, 1967
Net results from underwriting, investment earnings and realized profits and losses on investments, after Federal and other income taxes		$165,942,612*
Dividends:		
Cash	$105,370,843	
Stock	7,145,145	112,515,988
		53,426,624
Cash paid in as premium in excess of par value of stock issued, net of expenses		62,738,166
From changes in par value of stocks		2,206,680
Unrealized gain from revaluation of investments other than affiliates		101,322,017
Unrealized gain from revaluation of investments in non-consolidated affiliates		1,936,213
Unauthorized reinsurance		(3,427,166)
Non-admitted assets		(10,098,900)
Excess of statutory over case basis reserves		(1,473,724)
Reorganization and recapitalization expenses		(1,731,610)
Reserve for supplemental pensions		(2,352,136)
Minority interests		(213,396)
Surplus		$202,332,768

*This is a balancing figure between Surplus and other known factors as stated in the above table. It would involve undue effort, time and expense to analyse the Surplus account future.

Statements of the Non-Admitted Assets

	Reliance Ins. Co.	General Cas. Co.	Regent Ins. Co.	Planet Ins. Co.	Pilot Ins. Co.	United Pacific Co.	Cascade Ins. Co.	Total
Agents' balances or uncollected premiums over three months due	$3,690,944	$ 43,756	$523	[illegible]	$1,673	$ 41,184	$ 0	$ 4,074,526
Equipment, furniture and supplies	2,447,787	261,324	0	0	0	779,250	0	3,488,361
Equities in assets of underwriting groups	748,680	0	0	0	0	0	0	748,680
Funds held by ceding reinsurers	237,080	0	0	0	0	0	0	237,080
Other assets not admitted	1,357,471	10,180	0	114,216	0	66,480	1,916	1,550,253
Total	$8,481,962	$315,260	$523	[illegible]	$1,673	$886,914	$1,916	$10,098,900

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TENDER OFFER OF

Rapid-American Corporation

Common Stock,

Redeemable Common Stock Purchase Warrants

and cash

and/or

McCrory Corporation

7½% Sinking Fund Subordinated Debentures,

DUE MAY 15, 1994 (1971 Issue)

(To bear interest from November 15, 1971) and cash,

FOR COMMON STOCK OF McCRORY CORPORATION

McCrory Corporation ("McCrory") hereby invites tenders of its Common Stock, par value $.50 per share, in exchange (1) for Common Stock and Redeemable Common Stock Purchase Warrants ("Warrants") of Rapid-American Corporation ("Rapid") heretofore issued and now owned by McCrory, and cash, in the ratio of one share of Rapid Common Stock, two Warrants and $5 in cash per share and/or (2) for 7½% Sinking Fund Subordinated Debentures, due May 15, 1994 (1971 Issue) ("7½% Debentures"), of McCrory and cash, in the ratio of $30 principal amount of 7½% Debentures and $2.50 in cash per share, in each case subject to the terms and conditions set forth in this Prospectus and in the accompanying Form of Tender. (For information regarding market values as of October 18, 1971, see "Comparative Data—Market Price Comparisons" at page 8.)

The Common Stock of Rapid (including shares issuable upon exercise of the Warrants) is listed on the New York, Cincinnati and Pacific Coast Stock Exchanges and the Warrants are listed on the American and Pacific Coast Stock Exchanges. Application will be made to list the 7½% Debentures offered hereby on the New York or the American Stock Exchange; there can be no assurance that such listing can be obtained.

The 7½% Debentures will constitute unsecured general obligations of McCrory, and, will be subordinated to Senior Indebtedness, as defined (approximately $61,619,000 at July 31, 1971). The 7½% Debentures may be redeemed at the option of McCrory at any time prior to maturity at their principal amount together with accrued interest to the redemption date. (See "Tender Offer" and "Description of 7½% Debentures of McCrory").

The expenses of the Tender Offer, estimated not to exceed approximately $400,000, will be borne by McCrory.

Rapid intends to resell the McCrory 7½% Debentures which may be received by it pursuant to the Tender Offer, by public or private sale, at such prices and upon such terms as it may deem appropriate, and may be deemed an underwriter within the meaning of the Securities Act of 1933, as amended. McCrory will receive no part of the proceeds of such sales.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

ALLEN & COMPANY INCORPORATED
Dealer Manager

The date of this Prospectus is October 19, 1971.

Historical Earnings, Dividends and Book Values Per Share

The following tabulations present per share information for Rapid and McCrory as set forth in their separate financial statements elsewhere herein.

Year ended January 31,	Cash Dividends Paid Per Share	Book Value Per Share January 31, 1971(a)	Primary Earnings Per Share: Income Before Extraordinary Items	Primary Earnings Per Share: Extraordinary Items	Primary Earnings Per Share: Net Income	Fully Diluted Earnings Per Share: Income Before Extraordinary Items	Fully Diluted Earnings Per Share: Extraordinary Items	Fully Diluted Earnings Per Share: Net Income
McCRORY COMMON STOCK								
1967	$1.20	—	$1.81	—	$1.81	$1.52	—	$1.52
1968	1.20	—	2.27	—	2.27	1.67	—	1.67
1969	1.20	—	2.32	$ .18	2.50	1.52	$ .10	1.62
1970	1.20	—	2.84	—	2.84	1.91	—	1.91
1971	1.20	$15.23	2.99	—	2.99	2.43	—	2.43
RAPID COMMON STOCK								
1967	—	—	$2.44	$ .15	$2.59	$1.02	$ .08	$1.10
1968	$ .125	—	2.91	—	2.91	1.08	—	1.08
1969	.50	—	2.29	.97	3.26	1.08	.55	1.63
1970	.75	—	3.34	.13	3.47	1.41	.09	1.50
1971	.5625(b)	$23.79	2.11	(.29)	1.82	.83	(.25)	.58

(a) The book value per share of McCrory set forth herein is based upon common stockholders' equity of $67,965,000, which includes "excess of cost of investments in subsidiaries over related equities" of $20,627,000, or $4.62 per share. The book value per share of Rapid set forth herein is based upon common shareholders' equity of $158,083,000, which includes "excess of cost of investments over related equities" of $220,120,000, or $33.12 per share. In the opinion of the respective managements of McCrory and Rapid, such excess costs are similar in nature to intangibles which have not declined in value since acquisition of the related equities. See Note 4 of Notes to Financial Statements of McCrory and Note 5 of Notes to Financial Statements of Rapid, both included elsewhere herein.

(b) Rapid has not paid cash dividends on its Common Stock since August 1970 and does not anticipate that it will pay cash dividends on its Common Stock in the immediate future. Certain of Rapid's agreements relating to secured debt include prohibitions on the payment of cash dividends. See "Description of Capital Stock of Rapid—Dividend Rights" elsewhere herein.

Unaudited Pro Forma Earnings and Book Values Per Share

McCRORY COMMON STOCK(a)

	Book Value Per Share	Earnings Per Share: Primary	Earnings Per Share: Fully Diluted
McCRORY—Historical amounts as adjusted:			
Assuming full acceptance under the Tender Offer—McCrory reacquires 597,058 shares of its Common Stock under the Primary Offer and 398,038 shares under the Alternate Offer(b)	$ 7.84	$3.56	$2.71
Assuming 50% acceptance under the Tender Offer—McCrory reacquires 298,529 shares of its Common Stock under the Primary Offer and 199,019 shares under the Alternate Offer	$12.00	$3.24	$2.55

(a) No effect has been given to expenses of the Tender Offer nor for stock options and other commitments to issue shares of stock of McCrory.

(b) Based on McCrory unaudited pro forma consolidated financial statements included at pages 17 to 19 herein.

A 942

NOTICE OF MEETING GLEN ALDEN CORP.

Please sign, date and return the enclosed proxy promptly. A return envelope is enclosed for that purpose.

GLEN ALDEN CORPORATION

888 Seventh Avenue

New York, New York 10019

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

November 3, 1972

To Holders of Common Stock, Class B Cumulative Convertible (S3) Preferred Stock, $5.15 Cumulative Convertible Preferred Stock, and Class C (Contingent Preference) Stock of GLEN ALDEN CORPORATION:

A Special Meeting of the Stockholders of Glen Alden Corporation ("Glen Alden") will be held at the Gold Ballroom Foyer, Hotel duPont, 11th and Market Streets, Wilmington, Delaware, on Friday, November 3, 1972, at 12:00 Noon, local time, for the purpose of considering and acting upon:

1. The adoption of the Agreement of Merger, a copy of which is set forth as Exhibit A to the Proxy Statement accompanying this Notice, providing for, among other things, the merger of Rapid-American Corporation, an Ohio corporation, with and into Glen Alden, the name of which will be changed to "Rapid-American Corporation", on the terms and conditions set forth therein; and

2. Such other business as may lawfully come before the meeting or any adjournment thereof.

The stock transfer books of Glen Alden will not close, but only stockholders of record at the close of business on October 6, 1972 will be entitled to notice of and to vote at such meeting or any adjournment thereof.

By order of the Board of Directors,

STUART H. AARONS,
Secretary

Dated: October 6, 1972

Historical Earnings, Dividends and Book Values Per Share

The following tabulations present per share information for Glen Alden and Rapid as set forth in their separate financial statements elsewhere herein.

			Fully Diluted Earnings Per Share				Primary Earnings Per Share			
			Income Before Extraordinary Items				Income Before Extraordinary Items			
	Cash Dividends Per Share	Book Value Per Share At Latest Year End (a)	From Continuing Operations	From Operations Sold or Discontinued	Extraordinary Items	Net Income	From Continuing Operations (b)	From Operations Sold or Discontinued	Extraordinary Items	Net Income (b)
GLEN ALDEN COMMON STOCK										
Year ended December 31,										
1967	$.525		$ .25	$ .22	$ .13	$ .60	$(.29)	$ .86	$ .49	$1.06
1968	.175		.31	.43	.03	.77	.19	.89	.06	1.14
1969	—		.02	.52	.03	.57	(.13)	.84	.05	.76
1970	—		.21	.45	(.08)	.58	.15	.72	(.11)	.76
1971	.10	$ 7.80	.58	.35	.13	1.06	.67	.53	.18	1.38
RAPID COMMON STOCK										
Year ended January 31,										
1968	$.125		$1.06	$ .02	—	$1.08	$2.60	$ .07	—	$2.67
1969	.6875		1.09	(.01)	$ .55	1.63	2.17	(.04)	$ .97	3.10
1970	.5625		.75	.66	.09	1.50	.93	1.66	.13	2.72
1971	.5625		.14	.69	(.2[illegible])	.58	(.01)	1.41	(.29)	1.11
1972	—(c)	$26.49	1.09	.66	.23	1.98	1.66	1.06	.36	3.08

(a) The book value per share of Glen Alden Common Stock set forth herein is based upon common stockholders' equity of $136,297,000, which includes "excess of cost of investments in subsidiaries over related equities" of $102,174,000, or $5.85 per share. The book value per share of Rapid Common Stock set forth herein is based upon common shareholders' equity of $190,456,000, which includes "excess of cost of investments over related equities" of $193,479,000, or $26.91 per share. In the opinion of the respective managements of Glen Alden and Rapid, such excess costs are similar in nature to intangibles which have not declined in value since acquisition of the related equities. See Note D of Notes to Financial Statements of Glen Alden and Note 5 of Notes to Financial Statements of Rapid.

(b) After deduction of consolidated preferred dividend requirements.

(c) See footnote to "Annual Income Comparisons" above.

Unaudited Pro Forma Earnings and Book Values Per Share

The following Rapid per share amounts as at and for the year ended January 31, 1972 are based on the Rapid and Surviving Corporation Unaudited Pro Forma Statement of Consolidated Earnings From Continuing Operations Before Extraordinary Items and give effect to the Glen Alden transactions set forth in the following paragraph as well as to (i) the Rapid tender offer for 950,000 shares of common stock of Newberry, (ii) the McCrory-Newberry reorganization (see "History and Business of Rapid—History and Recent Developments—*Newberry*") and (iii) the acquisition by McCrory, in a recapitalization tender offer in November 1971, of 865,624 shares of its common stock.

The following Glen Alden per share amounts as at and for the year ended December 31, 1971 are based on the Glen Alden Unaudited Pro Forma Statement of Consolidated Income From Continuing Operations Before Extraordinary Items and give effect to (i) the sale by Schenley in May 1971 of The Buckingham Corporation for $120,000,000 in cash and notes, (ii) the merger of a wholly-owned subsidiary of Glen Alden with Schenley in June 1971, (iii) the purchase in November 1971 by Glen Alden of 4,000,000 shares of Glen Alden Common Stock at $11 per share, together with approximate concurrent related conversions of Glen Alden Preferred Stocks into Glen Alden Common Stock, (iv) the recent sales by Glen Alden and its subsidiaries of Panacon, the Retail Division of The B. V. D. Company, Inc. ("B.V.D.") and the Textile Division, and the assumed utilization of proceeds of such sales and (v) the redemption of the Glen Alden $2.25 Preferred Stock.

The following Surviving Corporation per share amounts as at and for the year ended January 31, 1972 are based on the Rapid and Surviving Corporation Unaudited Pro Forma Statement of Consolidated

CHAPTER 5

Intangible Assets

1. This chapter deals with problems involved in accounting for certain types of assets classified by accountants as intangibles, specifically, those acquired by the issuance of securities or purchased for cash or other consideration. Such assets may be purchased or acquired separately for a specified consideration or may be purchased or acquired, together with other assets, for a lump-sum consideration without specification by either the seller or the purchaser, at the time of purchase, of the portions of the total price which are applicable to the respective assets thus acquired. In dealing with the intangible assets herein considered, important questions arise as to the initial

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carrying amount of such assets, the amortization of such amount where their term of existence is definitely limited or problematical, and their write-down or write-off at some later time where there is a substantial and permanent decline in the value of such assets. These questions involve basic accounting principles of balance-sheet presentation and income determination and this chapter is designed to promote a fuller consideration of those principles. It does not, however, deal with the problems of accounting for intangibles developed in the regular course of business by research, experimentation, advertising, or otherwise.

CLASSIFICATION OF INTANGIBLES

2. The intangibles herein considered may be broadly classified as follows:

(a) Those having a term of existence limited by law, regulation, or agreement, or by their nature (such as patents, copyrights, leases, licenses, franchises for a fixed term, and goodwill as to which there is evidence of limited duration);

(b) Those having no such limited term of existence and as to which there is, at the time of acquisition, no indication of limited life (such as goodwill generally, going value, trade names, secret processes, subscription lists, perpetual franchises, and organization costs).

3. The intangibles described above will hereinafter be referred to as type (a) and type (b) intangibles, respectively. The portion of a lump-sum consideration deemed to have been paid for intangible elements when a mixed aggregate of tangible and intangible property is acquired, or the excess of a parent company's investment in the stock of a subsidiary over its equity in the net assets of the subsidiary as shown by the latter's books at the date of acquisition, in so far as that excess would be treated as an intangible in consolidated financial statements of the parent and the subsidiary, may represent intangibles of either type (a) or type (b) or a combination of both.

INITIAL CARRYING AMOUNT

4. The initial amount assigned to all types of intangibles should be cost, in accordance with the generally accepted accounting principle that assets should be stated at cost when they are acquired. In the case of non-cash acquisitions, as, for example, where intangibles are acquired in exchange for securities, cost may be considered as being either the fair value of the consideration given or the fair value of the property or right acquired, whichever is the more clearly evident.

AMORTIZATION OF INTANGIBLES

Type (a)

5. The cost of type (a) intangibles should be amortized by systematic charges in the income statement over the period benefited, as in the case of other assets having a limited period of usefulness. If it becomes evident that the period benefited will be longer or shorter than originally estimated, recognition thereof may take the form of an appropriate decrease or increase in the rate of amortization or, if such increased charges would result in distortion of income, a partial write-down may be made by a charge to earned surplus.

Type (b)

6. When it becomes reasonably evident that the term of existence of a type (b) intangible has become limited and that it has therefore become a type (a) intangible, its cost should be amortized by systematic charges in the income statement over the estimated remaining period of usefulness. If, however, the period of amortization is relatively short so that misleading inferences might be drawn as a result of inclusion of substantial charges in the income statement a partial write-down may be made by a charge to earned surplus,[1] and the rest of the cost may be amortized over the remaining period of usefulness.

7. When a corporation decides that a type (b) intangible may not continue to have value during the entire life of the enterprise it may amortize the cost of such intangible by systematic charges against income despite the fact that there are no present indications of limited existence or loss of value which would indicate that it has become type (a), and despite the fact that expenditures are being made to maintain its value. Such amortization is within the discretion of the company and is not to be regarded as obligatory. The plan

[1] See chapter 8, paragraphs 11, 12, and 13.

of amortization should be reasonable; it should be based on all the surrounding circumstances, including the basic nature of the intangible and the expenditures currently being made for development, experimentation, and sales promotion. Where the intangible is an important income-producing factor and is currently being maintained by advertising or otherwise, the period of amortization should be reasonably long. The procedure should be formally approved and the reason for amortization, the rate used, and the shareholders' or directors' approval thereof should be disclosed in the financial statements.

WRITE-OFF OF INTANGIBLES

8. The cost of type (b) intangibles should be written off when it becomes reasonably evident that they have become worthless. Under such circumstances the amount at which they are carried on the books should be charged off in the income statement or, if the amount is so large that its effect on income may give rise to misleading inferences, it should be charged to earned surplus.[1] In determining whether an investment in type (b) intangibles has become or is likely to become worthless, consideration should be given to the fact that in some cases intangibles acquired by purchase may merge with, or be replaced by, intangibles acquired or developed with respect to other products or lines of business and that in such circumstances the discontinuance of a product or line of business may not in fact indicate loss of value.

LIMITATION ON WRITE-OFF OF INTANGIBLES

9. Lump-sum write-offs of intangibles should not be made to earned surplus immediately after acquisition, nor should intangibles be charged against capital surplus. If not amortized systematically, intangibles should be carried at cost until an event has taken place which indicates a loss or a limitation on the useful life of the intangibles.

PURCHASE OF SUBSIDIARY'S STOCK OR BASKET PURCHASE OF ASSETS

10. A problem arises in cases where a group of intangibles or a mixed aggregate of tangible and intangible property is acquired for a lump-sum consideration, or when the consideration given for a stock investment in a subsidiary is greater than the net assets of such subsidiary applicable thereto, as carried on its books at the date of acquisition. In this latter type of situation there is a presumption that the parent company, in effect, placed a valuation greater than their carrying amount on some of the assets of the subsidiary in arriving at the price it was willing to pay for its investment therein. The parent corporation may have (a) paid amounts in excess of carrying amounts for specific assets of the subsidiary or (b) paid for the general goodwill of the subsidiary. In these cases, if practicable, there should be an allocation, as between tangible and intangible property, of the cost of the mixed aggregate of property or of the excess of a parent's investment over its share of the amount at which the subsidiary carried its net assets on its books at the date of acquisition. Any amount allocated to intangibles should be further allocated to determine, if practicable, a separate cost for each type (a) intangible and for at least the aggregate of all type (b) intangibles. The amounts so allocated to intangibles should thereafter be dealt with in accordance with the procedures outlined in this chapter.

CHAPTER 6

Contingency Reserves

1. The purpose of this chapter is to consider problems which arise in the accounting treatment of two types of reserves whose misuse may be the means of either arbitrarily reducing income or shifting income from one period to another:

(a) General contingency reserves whose purposes are not specific;

(b) Reserves designed to set aside a part of current profits to absorb losses feared or expected in connection with inventories on hand or future purchases of inventory.

2. Charges to provide, either directly or by use of a reserve, for losses due to obsolescence or deterioration of inventory or for

[1] See chapter 8, paragraphs 11, 12, and 13.

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ODELL

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of April ,19 77 at

No. 120 Broadway, NYC, 1 Battery Park Plaza, NYC; 645 Fifth Ave., NYC
888 Seventh Ave., NYC and 230 Park Ave., NYC

deponent servied the within Appendix (Vols I - II - III)

upon Fried,Frank,Harris,Shriver,&Jacobson, Esqs.,; Simpson,Thacher & Bartlett, Esqs.,; RUBIN, BAUM, LEVIN, CONSTANT & FRIEDMAN, Esqs.; MILTON N. SEASONWEIN, Esq. and Charles Trynin, Esq.

the Appellees herein, by delivering true copy(ies) thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellees therein.

Sworn to before me this
27 day of April 1977.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978